



COMPETITION COMMISSION OF INDIA

Case No. 34 of 2018

In Re:

M/s K.C. Marketing  
4<sup>th</sup> Floor, Offices No. 7 and 8, Ashok Sankul – I,  
Ashok Nagar, Range Hill Road,  
Opposite ICICI Bank (Bhosale Nagar Branch),  
Pune, Maharashtra – 411007

Informant

And

OPPO Mobiles MU Private Limited  
Represented by Mr. Eric Deng (Director),  
# 201, Lane No. 05, Marvel Alaina Building,  
Koregaon Park, Pune, Maharashtra – 411001

Opposite Party

CORAM

Mr. Sudhir Mital  
Chairperson

Mr. Augustine Peter  
Member

Mr. U. C. Nahta  
Member

**Present:** For M/s K.C. Marketing: Mr. M.S. Pandit and Mr. Harish Sandhu, Advocates  
alongwith Mr. Prakash Chaudhary, Proprietor

For OPPO Mobiles MU Private Limited: Ms. Radhika Gautam, Advocate  
alongwith Mr. Bhushan Gaikar, Assistant Manager (Legal) and Mr. Omesh  
Ludhani, Finance Manager

ORDER UNDER SECTION 26 (2) OF THE COMPETITION ACT, 2002

1. The present information was filed by M/s K.C. Marketing (**the Informant**), a proprietorship firm in Pune, under Section 19 (1) (a) of the Competition Act, 2002 (**the Act**), against OPPO Mobile MU Private Limited (**Opposite Party/ OP**), a private limited company registered under the provisions of the Companies Act, 2013, alleging contravention of the provisions of Sections 3 and 4 of the Act.



2. The OP is stated to be the Super Distributor of the company OPPO Mobiles India Private Limited in India and engaged in the business of trading and distribution of mobile phones and its accessories under the brand name -OPPO in India.
3. The Informant entered into a Sub-Super Mobile Distributorship Agreement dated 01.07.2016 with the OP whereby it was appointed as the exclusive Sub-Super Mobile Distributor of OPPO mobiles in South and Central Maharashtra.
4. The Informant alleged that since 30.11.2017, the OP has unilaterally stopped supplying the products/ mobile phones and accessories to the Informant for sale as the OP seeks to terminate the Sub-Super Distributorship Agreement of the Informant.
5. Further, the Informant stated that to raise an issue with the OP and to claim back its outstanding dues, the Informant sent a Legal Notice dated 30.04.2018 to the OP wherein it complained about raising of untenable debit notes, illegal charging of POP cost in violation of Clause 5.2 of the Sub-Super Distributorship Agreement and evasion of VAT by the OP and also sought clearance of pending Sales Support amount, refund of excess penalty charged under Clause 9 of the Sub-Super Distributorship Agreement for making sales outside the demarcated Sales Region and refund of Informant's Security Deposit. The Informant also stated that due to raising of such issues by the Informant, the OP has sought to terminate the Sub-Super Distributorship Agreement of the Informant.
6. In reply thereto dated 19.05.2018, the OP wrote that despite necessary business support from the OP, the Informant was not able to manage the business in order to increase sales. Rather, its assurances turned into baseless, false and vague commitments. In spite of several strategic business meetings, the Informant could not improve its performance in the Sales Region. Upon a mutual agreement, with effect from November 2017, the Informant only had stopped purchasing the stock of handsets from the OP. Further, upon due diligence and recording of accounting entries, the OP has found that the total claim raised by the Informant is unreasonable and beyond the scope of the actual transactions. The amount eventually settled between them was also with the agreement of both the parties. Out of the same, part payment has been made and the remaining has been settled against valid Debit Notes. Also, the OP stated that all the other claims made in the Legal Notice are baseless.



7. In response to such reply, the Informant sent a rejoinder dated 12.06.2018 to the OP stating that the Sub-Super Distributorship Agreement entered into between them was anti-competitive in nature violating Section 3 of the Competition Act, 2002 which prohibits an agreement of such nature restricting the area of operation/ area allocation which under Section 19, the Competition Commission of India has the power to inquire into. Further, the Informant wrote that business performance depends upon several factors including market conditions and support of the manufacturer *etc.* Despite several constraints, the Informant had done its best to further the interests of the OP. If the product was not being sold to the desired extent, it was the responsibility of the OP to improve the quality of the product and double the marketing efforts. During the same period, the sales of OP's products had fallen pan India and contentions raised by the OP do not have any merit. Also, it was again reiterated that VAT was being evaded by the OP and for the same, the Informant's claims were adjusted against the POP cost by the OP. Therefore, the Informant stated that the OP had indulged in unfair trade practices and failed to fulfil the commitment to settle the outstanding dues resulting in loss and damages to the Informant.

8. Again, *vide* a notice dated 25.06.2018, the Informant called upon the OP to refund the Security Deposit made by the Informant and clear its outstanding dues. In the notice, the Informant also informed the OP that it is preparing to file an information with the Competition Commission of India.

9. In view of the above, the Informant alleged in the information that certain clauses in the Sub-Super Distributorship Agreement, which impose a restriction upon the Informant from selling the products/ mobile phones and accessories of the OP outside a defined geographical area (the Informant's demarcated Sales Region), are anti-competitive in nature; specifically Clauses 8 and 9 which penalise and restrict online sales and cross-regional sales amount to using unfair practices by the OP by sharing the market or dividing the market through anti-competitive agreements. Imposition of penalty on a product like mobile for sales outside the geographical area was alleged by the Informant to be highly unfair, arbitrary and punitive in nature.



10. Apart from the above, the following conducts of the OP, as per the Informant, amount to abuse of dominant position by the OP:

- (a) Stoppage of supplies for sale to the Informant since 30.11.2017.
- (b) Charging the cost of POP material supplied to the Informant though Clause 5.2 of the Sub-Super Distributorship Agreement states that POP will be given free of charge.
- (c) Evasion of payment of VAT upon the goods supplied to the Informant by adjusting the Informant's claims against the POP material cost.
- (d) Not clearing the outstanding dues of the Informant.

11. Based on the above averments and allegations, the Informant filed the present information against the OP, alleging contravention of the provisions of Section 3 and Section 4 of the Act.

12. After considering the information and the documents annexed therewith, the Commission held a preliminary conference with the parties on 17.10.2018. In the oral hearing, the learned counsel for the Informant argued that Clauses 8 and 9 of the Sub-Super Distributorship Agreement which impose a restriction upon the Informant from selling OPPO products online or outside its defined Sales Region, and imposition of penalty in breach thereof, are in the nature of geographical allocation of market. The same are hence, *per se* anti-competitive under the provisions of Section 3 (3) (c) of the Act. As per the learned counsel, Section 3 (3) cannot be said to be exclusively applicable only upon anti-competitive agreements between competitors *i.e.* horizontal agreements; rather the language of Section 3 (3) is inclusive in nature which encompasses within its ambit all kinds of anti-competitive agreements of horizontal or vertical.

13. Further, the learned counsel argued that even if Section 3 (3) is ignored, the impugned clauses anyhow fall foul of Section 3 (1) of the Act. Moreover, the said clauses, if cannot be examined from the perspective of Section 3 (3) of the Act, may be seen under Section 3 (4) of the Act being in the nature of an exclusive distribution agreement. As far as causing of appreciable adverse effect on competition (AAEC) is concerned, such restriction upon online sales or sales outside a demarcated area, largely affects public interest. It restricts competition



between Sub-Super Distributors in the market which adversely affects the consumers in the market. Even under the erstwhile Monopolistic and Restrictive Trade Practices Act, 1969, such restriction amounted to a restrictive trade practice.

14. The learned counsel also argued that imposition of penalty under the impugned clauses as well as conduct of the OP like evasion of VAT, imposition of POP cost, *etc.* also amounts to abuse of dominant position in violation of Section 4 of the Act. Regarding dominance of the OP, the learned counsel stated that as per its market knowledge, the OP holds around 20% share in the market. Upon being asked about the source of such information of the Informant, the learned counsel relied upon the GFK Statistical Reports.

15. In reply thereto, the learned counsel for the OP submitted that first of all, there is no AAEC in terms of Section 3 (4) of the Act as though the Informant may have been restricted to sell outside the Sales Region, but there is no bar on the customers of one sales region to purchase OPPO products from a dealer in another sales region. Further, there is no restriction on the Informant to deal in the products of other brands inside or outside the Sales Region. Infact, the Informant has already severed his ties with the OP and is now dealing in the products of the smartphone brand -MIØ. Though because of the grievances of the Informant, the OP was ready to offer him Sub-Super Distributorship in another sales region, however, the Informant discarding the same is now dealing in the products of another smartphone brand. The restriction imposed upon a Sub-Super Distributor to not sell OPPO products outside its sales region is to protect the interests of all Sub-Super distributors/ dealers who have made an investment in OPPO distributorship and the same is not in the nature of any anti-competitive restriction. There is no inter-brand or intra-brand competition restricted due to such geographical restriction.

16. Further, the learned counsel submitted that as far as the restriction on online sales is concerned, again, the same does not have any AAEC in India. The same is imposed upon all Sub-Super Distributors pan India without any discrimination because the OP makes online sales of its products on its own. This, the OP is entitled to do, as being the intellectual property holder of OPPO products, it is free to exploit its intellectual property in any way it pleases. Lastly, the other grievances raised by the Informant alleging abuse of dominance are



in the nature of contractual disputes and anyhow, it is common knowledge that the OP is not a dominant player in the market.

17. The Commission has carefully analysed the information filed by the Informant, the documents annexed therewith, and the information available in the public domain as well as deliberated upon the arguments put forth by the respective learned counsel for the parties during the oral hearing held on 13.10.2018.

18. The basic grievance of the Informant is that in the exclusive Sub-Super Distributorship Agreement dated 01.07.2016 entered into between the Informant and the OP whereby the Informant was appointed as the exclusive Sub-Super Distributor of the OP for trading and distribution of OPPO mobile phones and accessories in the region of South and Central Maharashtra, there were certain clauses which restricted the Informant from selling the OPPO products either online or outside his Sales Region of South and Central Maharashtra. These as per the Informant, are in contravention of the provisions of Sections 3 and 4 of the Act. Further, the Informant alleges that because of the disputes which arose between the Informant and the OP for the reason that the OP imposed upon the Informant penalties for selling products online and outside his Sales Region, since November 2017, the OP stopped supplying products for sale to the Informant. This, alongwith certain other conduct of the OP like illegally charging POP material cost from the Informant though Clause 5.2 of the Sub-Super Distributorship Agreement obligated the OP to supply the POP material to the Informant free of cost, evasion of payment of VAT upon the goods supplied to the Informant, and failure to clear outstanding dues of the Informant, has also been alleged by the Informant to be abuse of dominant position by the OP in contravention of Section 4 of the Act.

19. First of all, the Commission proceeds to analyse the conduct of the OP under the provisions of Section 4 of the Act. To assess the conduct of the OP under Section 4 of the Act, primarily, a relevant market needs to be delineated. Thereafter, the position of dominance of the OP in such relevant market needs to be ascertained. Only if the OP is found to be in a dominant position in such relevant market, analysis of abuse of dominance would be needed to be made.



20. In the present case, the Informant has not delineated any Relevant Market. The OP is stated to be the Super Distributor of the company OPPO Mobiles India Private Limited in India and engaged in the business of trading and distribution of OPPO mobile phones and accessories in India. From the website of OPPO Mobiles India Private Limited, it is seen that under the brand name "OPPO" only smartphones are manufactured and sold. The Commission notes that on the basis of the factors stated under Section 19 (7) of the Act, "smartphone" in itself is a separate category of product; this is because a mobile phone is a product distinct from a fixed line phone or a tablet/ phablet/ laptop or any other electronic device. It has distinct physical characteristics and end use. Further, a mobile phone can be categorised into three types of basic phone, feature phone and smartphone. A basic phone is the one which is a black and white phone having no internet access. On the other hand, a feature phone is the one which has qwerty keypad, access to internet and certain built in apps. In the recent times, the new phone which has come into the market and captured major part of the same is the smartphone which, in contrast to a feature phone has several add-on features like touch-screen, high megapixel camera, GPS, embedded memory, wireless synchronization with other devices, ability to download applications and run them independently, support for third-party applications, ability to run multiple applications simultaneously, gaming, unified messaging *etc.* The same cannot be substituted with a basic phone or a feature phone, and a consumer wanting to buy a smartphone will not opt for buying a basic phone or a feature phone. Therefore, the relevant product market in the present case may be defined as the market for "smartphones".

21. With regard to the relevant geographic market, the Commission notes that the OP is the Super Distributor of OPPO mobile phones and accessories in India. Any marketing agency wanting to take Sub-Super Distributorship of OPPO mobile phones and accessories in India would have to approach the OP. Therefore, the relevant geographic market in the present case would be "India".

22. Based on the above, the relevant market in the present case may be delineated as the market for "smartphones in India".

23. Regarding dominance of the OP in this market, the learned counsel for the Informant stated during the oral hearing that based on the GFK market study, since the OP has a major



share in the market, it is a dominant entity. However, from the actual GFK Statistical Report 2017-2018 available with the Commission in another case *i.e.* Case No. 15 of 2018, it is noted that OPPO had a pan India market share of only 10-13% in 2017-2018 while the top brand Samsung in comparison had market share ranging from 31-33%. Such data is also supported by the information available in the public domain on other websites. From the IDC Report on Top Five Smartphones in India Market Share, 2017<sup>1</sup>, it is noted that Samsung and Xiaomi had the market shares of 24.07% and 20.9% respectively while in comparison, the OP had a market share of only 7.5%. It is hence, clear that the leading brand of smartphones in India is Samsung and in comparison, the market share of the OP is very limited. Further, even on the basis of analysis of other factors stated under Section 19 (4) of the Act, the same conclusion is drawn that the OP is not a dominant player in the smartphones market in India. From the information available on the internet<sup>2</sup>, the Commission notes that the estimated annual revenue of the OP is \$ 137.7 million and the number of estimated employees is 750 while the estimated annual revenue of Samsung Mobiles is \$ 226.1 billion and the number of estimated employees is 3,20,671.

24. It is also noted by the Commission from the information available in the public domain that OPPO, Vivo and OnePlus brands of smartphones are owned by a single entity *i.e.* BBK Electronics, a Chinese consumer electronics manufacturer. OPPO and Vivo are parts of BBK, while OnePlus is a wholly owned subsidiary of OPPO. However, even if the combined market share of OPPO, Vivo and OnePlus in the relevant market is looked at, yet even as a group as defined under Section 4 Explanation (c) read with Section 5 Explanation (b) of the Act, BBK Electronics though is a significant market player, is not dominant in the relevant market. Hence, in the absence of dominant position of the OP in the relevant market, any question of abuse of dominance does not arise.

25. Even otherwise, the conduct of the OP alleged to be an abuse under the Act such as stoppage of supplies for sale to the Informant since 30.11.2017, charging of POP cost though Clause 5.2 of the Sub-Super Distributorship Agreement states that POP will be given free of charge, evasion of payment of VAT, not clearing the outstanding dues of the Informant *etc.*

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<sup>1</sup> <https://www.idc.com/getdoc.jsp?containerId=prAP43569518>

<sup>2</sup> <https://www.owler.com/company/oppo>; <https://www.owler.com/company/samsung>





are neither supported by any documentary proof, and nor do the same form a competition issue.

26. Next, regarding the allegations made under Section 3 of the Act, the CAU notes that the Informant primary alleges that the restriction imposed by the OP upon it from selling products online or outside the demarcated Sales Region, is violative of Section 3 (3) (c) of the Act amounting to sharing the market by way of allocation of geographical area of the market. However, the Commission is of the view that since the Informant and the OP between whom such restriction applied are not *“engaged in identical or similar trade of goods or provision of services”*, which is the basic requirement of Section 3 (3) of the Act. Therefore, any such allocation of geographical area of market between the two of them cannot be examined under Section 3 (3) of the Act. Though the learned counsel for the Informant tried to argue during the oral hearing that Section 3 (3) of the Act is an inclusive provision as it says *“... any association of enterprises or association of persons, **including** cartels, engaged in identical or similar trade of goods or provision of services ...”*, which is not strictly restricted to only horizontal agreements between competitors but also encompasses vertical agreements of the kind impugned in the present case, the Commission is of the view that the jurisprudence regarding Section 3 (3) of the Act is well-settled, even by the Honorable Supreme Court’s judgments, and the word *“including”* applies only as a prefix to the word *“cartels”* and not as a prefix to the words *“engaged in identical or similar trade of goods or provision of services”* written thereafter. Thus, the Commission does not find such argument of the learned counsel to be tenable.

27. However, since the Informant and the OP are *“engaged at different stages or levels of the production chain in different markets”*, the Commission also analysed the conduct of the OP under the provisions of Section 3 (4) of the Act. To examine a matter under Section 3 (4) of the Act, the following points need to be analysed:

- (a) Existence of an agreement;
- (b) Between *“enterprises”* or *“persons”*;
- (c) Engaged at different stages or levels of the production chain in different markets;



- (d) In respect of production, supply, distribution, storage, sale or price of, or trade in goods, or provisions of services;
- (e) Including tie-in-arrangement, exclusive supply agreement, exclusive distribution agreement, refusal to deal, and resale price maintenance;
- (f) Which agreement causes or is likely to cause an AAEC in India.

28. In the present case:

- (a) There existed an agreement between the Informant and the OP which is the Sub-Super Distributorship Agreement dated 01.07.2016.
- (b) The said agreement is between two commercial entities which are enterprises within the meaning of Section 2 (h) of the Act as both of them are engaged in economic activities.
- (c) The agreement is in respect of distribution and sale or trade in goods *i.e.* mobile phones and accessories.
- (d) The same by virtue of Clauses 1.7, 2.4, 2.6, 8 and 9, allocates the area and/ or market for the disposal or sale of goods by the Informant.
- (e) The Informant and the OP are engaged at different stages or levels of the production chain in different markets as the OP is the trader and distributor of OPPO mobile phones while the Informant is the Sub-Super Distributor/ marketing agency of OPPO mobile phones.

29. However, regarding the agreement causing or likely to cause an AAEC in India, the Commission has to analyse the factors stated under Section 19 (3) of the Act.

30. The clauses of the Sub-Super Distributorship Agreement restricting sales of the Informant online as well as outside South and Central Maharashtra alleged to be anti-competitive neither create any barriers to entry in the market, nor drive the existing competitors out of the market. They also cannot be said to foreclose the market by hindering competition.



31. The learned counsel for the OP has argued before the Commission that though the Informant may have been restricted to sell outside its demarcated Sales Region; however, there is no bar on the customers of one sales region to purchase OPPO products from a dealer in another sales region. Further, there is no restriction on the Informant to deal in the products of other brands in or outside the Sales Region. Infact, the Informant has already severed his ties with the OP and is now dealing in the products of the smartphone brand ~~MI~~ Such restriction imposed upon the Sub-Super Distributors to not sell OPPO products outside their demarcated sales region is to protect the interests of all Sub-Super Distributors/ dealers who have made an investment in OPPO distributorship. There is no inter-brand or intra-brand competition restricted due to such geographical restriction. The Commission is of the opinion that in view of such submissions of the learned counsel for the OP and also keeping in mind the fact that in lieu of such restriction against sales outside the Sales Region, the Informant has been given the exclusive right to sell within the Sales Region, it is evident that no AAEC in India because of such restriction is or is likely to be caused. Therefore, the clauses of the Sub-Super Distributorship Agreement restricting sales of the Informant outside South and Central Maharashtra cannot be held to be in contravention of Section 3 (4) of the Act.

32. Further, regarding restriction on online sales, the learned counsel for the OP has argued that the same also does not cause any AAEC in India. Such restriction is imposed upon all Sub-Super Distributors pan India without any discrimination because the OP makes online sales of its products on its own. This, the OP is entitled to do as being the intellectual property holder of OPPO products, it is free to exploit its intellectual property in any way it pleases. Though the Commission does not find merit in the intellectual property argument put forth by the learned counsel for the OP to be a valid justification for imposition of such restriction, yet it notes that OPPO smartphones are freely available in the market at competitive prices and are also easily available for purchase online on all major websites like flipkart, snapdeal, amazon, paytm mall *etc.* at discounted rates. Also, as noted above, by such restriction, no inter-brand or intra-brand competition has been restricted. The Informant has already switched over his business to another smartphone brand. Thus, in such view, Clause 8 of the Sub-Super Distributorship Agreement also cannot be held to be in contravention of Section 3 (4) of the Act.



33. In view of the above analysis, the Commission holds that no case of contravention of either Section 3 or Section 4 of the Act is made out against the OP in the present matter.

34. In view of the foregoing, the matter is ordered to be closed forthwith in terms of the provisions of Section 26 (2) of the Act.

35. The Secretary is directed to communicate the order to the parties, accordingly.

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

Sd/-  
**(Augustine Peter)**  
**Member**

**New Delhi**  
**Date: 08.11.2018**

Sd/-  
**(U. C. Nahta)**  
**Member**