



COMPETITION COMMISSION OF INDIA
Case No. 35 of 2018

In Re:

**M/s Karni Communication
Private Ltd.,
G-22, Hemkunt Chambers,
89 Nehru Place, Delhi- 110019**

Informant No. 1

**M/s Karni Telnet Private Ltd.
G-63, Ground Floor,
East of Kailash, New Delhi –
110065**

Informant No. 2

And

**Haicheng Vivo Mobile (India)
Private Ltd.
O-16, 2nd & 3rd Floor, Lajpat
Nagar Part-II
New Delhi- 110024**

Opposite Party No. 1

**Vivo Mobile India Private Ltd.
10th & 11th Floor, Palm
Springs Plaza (Complex)
Village Wazirabad, Sector-54,
Gurugram, Haryana-122003**

Opposite Party No. 2

**Vivo Communication
Technology Co. Ltd.
No. 281, Wu Sha Bub U Gao
Street, Chang An Town,
Dongguan, Guangdong- 523860**

Opposite Party No. 3



CORAM:

Mr. Ashok Kumar Gupta
Chairperson

Mr. U. C. Nahta
Member

Ms. Sangeeta Verma
Member

Present:

For Informants: Mr. Rajshekhar Rao, Advocate, Mr. Abdullah Hussain, Advocate, Mr. Divye Sharma, Advocate, Ms. Perna Parashar, Advocate, Mr. Karthik Sundar, Advocate, Mr. Om Baheti, Managing Director (Informant No. 1), Ms. Ananta Baheti, Executive Director (Informant No.1)

For Opposite Party – 1: Mr. Vaibhav Gaggar, Advocate, Ms. Neha Mishra, Advocate, Ms. Aayushi Sharma, Advocate, Ms. Niti Richhariya, Advocate, Ms. Fiona, Finance Manager, Ms. Cindy, HR Manager

For Opposite Party – 2: Mr. Aaditya Vijay Kumar, Advocate, Mr. Aneesh Sadhwani, Advocate, Mr. Manvendra Deo, Legal Counsel

For Opposite Party – 3: None

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

1. The Information in the present case has been filed under Section 19(1)(a) of the Competition Act, 2002 (“**Act**”) by M/s Karni Communication Private Limited (“**Informant No. 1**”) and M/s Karni Telnet Private Limited (“**Informant No. 2**”), collectively referred to as Informants, against Haicheng Vivo Mobile (India) Pvt. Ltd.(“**OP-1**”), Vivo Mobile India Private Ltd.(“**OP-2**”) and Vivo Communication Technology Co. Ltd.(“**OP-3**”), collectively referred to as Opposite Parties (“**OPs**”), alleging contravention of provisions of Section 3(4) read with Section 3(1) of the Act.
2. As stated in the Information, OP-1 is in the business of trading and distribution of mobile handsets in India. OP-1, entered into a ‘Distributor Agreement’, with Informant No. 1, on 19.01.2017, wherein it was appointed as the non-exclusive distributor for the region



of 'South Delhi Part – I', 'South Delhi Part-II' and 'South Delhi Part-III', for distribution of mobile handsets under the brand name, 'Vivo'. OP-1 is stated to have entered into another 'Distributor Agreement' with Informant No. 2 in April, 2017, wherein it was appointed as a distributor for the region of 'South Delhi Part –IV' for distributorship of mobile handsets under the brand name *Vivo*.

3. The Informants have submitted that they were appointed as distributors for mobile handsets under the brand 'Vivo', accessories of mobile handsets 'Vivo' and such other products that OP-1 may supply from time to time, in consultation with the Informants.
4. It has been alleged that the representatives of OP-1 started approaching the Informants, since early 2017, stating that the retailers of the Informants were not adhering to the terms of the Distributor Agreements with respect to the following aspects:
 - a) **Restriction on online sales**
 - i) The Informants have submitted that pursuant to the aforementioned Distributor Agreements entered into between the Informants and OP-1, the Informants were bound by certain obligations towards OP-1, under clause 3 therein. Under these obligations, at sub-clause (p), the Informants were to take full responsibility for its retailers to ensure that no online sales take place, thereby implying that the sale of *Vivo* mobile handsets and accessories would not be allowed through the online channels of distribution to either the Informants or their retailers.
 - ii) The Informants have made reference to the notifications with respect to '*Goods being sold through online and below Minimum Operation Price*' ("**MOP**"), issued by OP-1. Through these notifications, the sales team of *Vivo*, including Informant No. 1, were informed about OP-1's policy of strictly prohibiting online sales of its products and the penalty to be imposed on the members of sales team, in case they failed to adhere to these conditions.
 - iii) The Informants have alleged that OP-1 was levying heavy penalties on the Informants and its retailers, in case sales were made *via* online marketplace. The Informants have submitted minutes of meeting held on 25.02.2017, at the office of OP-1.



- iv) The Informants have further submitted that as per OP-1's '*Shop Boy-Special Boost up Scheme*', each of *Vivo* branded mobile handsets must be sold in accordance with the MOP and must not be sold *via* online platform. Further, the scheme also dictated that in case OP-1 found out that any such sale of *Vivo* branded mobile handsets has been made online, OP-1 will cancel all payouts to the distributor.
- v) The Informants averred that according to the '*Vivo All GT Dealer Monthly Scheme*', for February 2018, OP-1 restricted sale of *Vivo* branded mobile handsets *via* online platform by cancelling all payouts to the distributor who did not adhere to such restrictions.

b) Market Infiltration Policy ("MIP")

- i) As regards MIP, the Informants submitted that in gross violation of provisions of the Act, the OPs were collectively imposing a scheme of penalising the distributors/ retailers in the event they were found to be indulging in MIP. It has been submitted that Clause 3 of the Distributor Agreement lists the obligations of the Informants towards OP-1. Sub-clause (h) and (o), of the said distributor agreements explicitly imposed a restriction together with provision for imposition of penalties on the Informants, mandating them to comply with the condition that no sales will be made either by the Informants or by their retailers beyond the Authorised Distributor Zone. The aforesaid clauses are as follows:

Clause 3(h) - "*will not sell to any person or body corporate, the goods which they know or have reason to believe are intended for resale outside the Authorised Distributor Zone.*"

Clause 3(o) - "*will take full responsibility to manage its retailers for any wholesale or any sale which they know or have reason to believe are intended to be market infiltration.*"

- ii) The Informants have further submitted the following, to substantiate their allegation against MIP of OP-1:



- a. Minutes of the meeting attended by the distributors of OP-1 on 25.02.2017, which contained that several retailers were not maintaining the MIP in the relevant market due to which OP-1 was facing penalties from its Head Office.
- b. Notifications issued to the sales team of OPs, their distributors and retailers imposing penalties for violating the MIP.
- c. OP-1 was illegally levying penalties by way of issuing various Debit Notes on Informants. However, when it was brought to the notice of OP-1 that its own officials, were in fact indulging in market infiltration, a revised debit note was issued on Informant No. 1 and the amount of penalty levied was reduced. It is also relevant to mention that a debit note bearing no. DN-DL001 was arbitrarily revised on three different dates by the OPs for an alleged violation of MIP by Informants. Additionally, when the Informants approached representatives of OP-1 to raise their concerns over imposition of such arbitrary penalties for market infiltration, the representatives of OP-1 merely forwarded an e-mail containing the agreement which reiterated the market infiltration clauses that required ratification from retailers to not sell the products outside the geographic area.
- d. Imposition of penalties on Informant No. 1 for an alleged violation of the MIP.
- e. E-mail dated 13.02.2017 by OP-1 sent to distributor that the payout to the retailer for January 2017 would not be given as the retailer's stock was found to have been sold in a territory outside the authorised distributor zone.
- f. E – mail trail between OP-1 and the Director of Informant No. 2 requesting the latter to become mystery shopper and catch infiltrators violating the MIP.

c) MOP violation

- i) The Informants alleged that practice of the OPs mandating a MOP is Anti-competitive and in violation of the Act. It has been submitted that Clause 7 of the Distributor Agreements clearly mandates the MOP as follows:

“The First Party (OP-1) shall be entitled to suggest MOP in respect of the resale or disposal by the Second Party's (Informants) stock of the Products supplied to the DISTRIBUTOR as per orders



placed by the Second Party. The Second Party shall ensure its retailers to sell not less than MOP suggested by First Party but he may at his discretion charge prices higher than the suggested MOP.”

5. The Informants have averred that due to the abovementioned reasons, OP-1 imposed an arbitrary penalty of five times the MOP on the Informants.
6. As per the Informants, OPs, also sent a list of International Mobile Equipment Identification (“IMEI”) numbers for stocks which were sold by the Informants to the retailers and found that the said IMEI numbers were sold in other states or wholesale markets, resulting in breach of the MIP. The Informants have further averred that *prima facie* such a MIP/ territorial allocation to dealers and distributors, is in contravention of the Act. The Informants have also submitted that all their requests to waive off the alleged penalties incurred on them were denied by OP-1.
7. Based on the above averments and allegations, the Informants have alleged that the OPs have contravened the provisions of Sections 3(4) of the Act.
8. The Informants have, *inter-alia*, prayed that an inquiry into the matter be conducted by the Director General and relief be granted under Section 27 of the Act. Further, the Informants have sought certain interim reliefs under Section 33 of the Act, *inter-alia* seeking order of restraint against the OPs from arbitrarily removing the retailers from Data Management System, imposing restrictive clauses of the Distributor Agreements and levying arbitrary penalties.
9. During the course of the proceedings and pursuant to the directions of the Commission, OP-1 and OP-2 filed certain documents on 19.11.2018. Subsequently, during the preliminary conference held on 21.12.2018. OP-1 and OP-2 submitted the following:
 - a) There is no bar on online sales of the mobile phone units of the *Vivo* brand as they are being offered on the official e-store of Vivo India, *i.e.* <https://shop.vivo.com/in>, and therefore, there was no limitation or withholding of mobile phones and



accessories of the *Vivo* brand as the consumers have the option of purchasing these directly from its official website. OP-1 has submitted that Vivo India also sells smartphones through *Amazon*, *Flipkart*, *Snapdeal* and *Paytm mall*, either through dealers or supplies directly to them.

- b) Regarding the MIP, OP-1 has submitted its justification for having such a policy by stating that otherwise it would be extremely detrimental to the financial health of distributors and retailers, who have invested significant amounts of capital within their respective territories to promote and sell units of the brand. It was also submitted that within any specific region there was dynamic competition in the sub-distributor market as well as in the retailer market and there would be an adverse effect on such competition if stocks from one region were permitted to infiltrate another region. Further, this policy was also crucial to ensure that counterfeit units in the market are checked which could pose a serious threat to security. The system of tracking of IMEI numbers by a state-level distributor within its region was beneficial in prevention of duplication of IMEI numbers. Furthermore, OP-1 stated that limitation of IMEI number to a specific region enabled the accurate computation of rewards linked to the sale of units, which was for the benefit of the retailers and could be effectively implemented only if the geographical assignment among sub-distributors was carried into effect. OP-1 also stated that the MIP ensured maintenance of a healthy retailer network and addressed predatory pricing by retailers that could cause potential adverse influence in the market.
- c) OP-1 also submitted that the direct consequence of MOP was that profit margin of retailers had increased, without any corresponding increase in prices for consumers, demonstrating the benefits of MOP policy on retailers and consumers. OP-1 further reiterated that within the retailer market, there had been several instances of retailers engaging in predatory pricing with the intent of reducing the competition in the market. Predatory pricing by a retailer raised barriers to entry within the market and prevented other retailers from being able to enter the market. Therefore, the stipulation of MOP pre-empted the possibility of predatory pricing by any retailer, thereby ensuring level playing field within the market for retailers eventually benefitting the consumers. Further, OP-1 also invested significant amounts of capital



and expended effort in training personnel and the stipulation of minimum price floor under MOP allowed benefits to be enjoyed by the consumers of the brand.

- d) OP-2 submitted that it appoints state-level distributors for *Vivo* mobile phones and accessories in each specific territory of India, by entering into a “Primary Distributor Agreement”. Each state-level distributor appoints sub-distributor and enters into “Secondary Distributor Agreement”. It was also submitted that OP-2 had no role to play as far as the Secondary Distributor Agreement was concerned.

10. Subsequently, the Informants made fresh submissions based on documents filed on 21.12.2018 and were heard by the Commission in the preliminary conference held on 07.01.2019. However, the Commission *vide* its order dated 07.01.2019 decided to re-list the matter for preliminary conference with the Informants as well as OPs on 13.02.2019 which was thereafter re-scheduled to 28.03.2019, at the request made by the parties.

11. In the preliminary conference, the counsel for the Informants submitted at length, with respect to the allegations mentioned above. He also submitted that based on the admission of the OP-1 in its response dated 19.11.2018, it appears that the OPs are facilitating/ contributing to a cartel at the retailer level under the aegis of the All India Mobile Retailers Association (“AIMRA”), in violation of provisions of Section 3(3) of the Act. The counsel also contended that OP-1, OP-2 and OP-3, are controlled by BBK Electronics Corporation, a Chinese conglomerate, which owns four brands under which mobile phones are sold in India, namely, *Oppo*, *Vivo*, *OnePlus* and *Realme* thereby making its combined market share to be more than of any other competitor in India. This, according to Informants, gave the OPs a very high market power to cause Appreciable Adverse Effect on Competition (“AAEC”) in the market for smartphones in India.

12. The counsel for OP-1 argued in terms of the written submissions made by OP-1 on 19.11.2018. He submitted that the allegations levied in the Information were based entirely on conjectures and surmises. He also submitted that the Information interchangeably referred to OPs without properly differentiating between such entities. That approach was erroneous as the sub-distributors, including the Informants, were appointed by OP-1 and not by OP-2. Such references to the OPs by the Informants,



were made with the intention to mislead the Commission and to damage the reputation of OP-1. OP-1 further submitted that the Informants had concealed the material fact that Informant No. 1 was appointed its sub-distributor in 2015, while the distributor agreement was entered with Informant No. 1 much later in 2017. Informant No. 1 did not raise any concern with respect to the policies promulgated by OP-1 from 2015 to 2017 and this misconceived Information had been filed before the Commission after 2017 only to arm twist OP-1 as the Informants were found to be blatantly violating its policies consequent to which penalty of Rs. 2,00,00,000/ and Rs. 17,00,000/ had been imposed by OP-1 on Informant No. 1 and Informant No. 2 respectively on 17.05.2017 and 26.05.2017.

13. The counsel for OP-1 vehemently opposed the contention that OP-1 was connected with the BBK group and submitted in this regard that shares of OP-1 are held by two individuals in their personal capacity, namely Mr. Hexi and Mr. Tangwensheng with 99.9% and 0.1% shareholding respectively. There was no direct or indirect evidence that OP- 1 has any shareholding in the BBK group or vice versa. Neither does OP-1 have any common directors with the BBK group nor with *Oppo*.
14. The counsel for OP-1 submitted that the fact that brands incur very steep expenditures in marketing and promotion clearly show that the market was competitive and that there was no restraint of competition or any AAEC caused in the market for smartphones in India.
15. The counsel for OP-1 further submitted that the Distribution Agreement between OP-1 and OP-2 pertained only to offline sales and not online sales of products given to OP-1. As no right for online sales had been given to OP-1, the question of restricting online sales by OP-1, with respect to its sub-distributors, such as the Informants, did not arise. Further, the retailers and sub-distributors had complete flexibility to move away from the *Vivo* brand in case they did not wish to abide by the policies of OP-1 and this was not a case of incurring huge sunken costs and thereby becoming a captured customer. Thus, the Informants were not forced by OP-1 to have a business relationship with it in any manner and there existed no exit barriers either in the agreement or otherwise.



16. The counsel for OP-1 also contended that the allegation of the Informant that the policies of OP-1 had been put in place pursuant to a cartel at the retailer level was gravely erroneous and was not supported or substantiated by any documentary evidence and was again based on pure surmises and conjectures. The OPs also contended that the Informants had omitted to implead any retailers or the AIMRA in the instant matter in support of such an allegation.
17. The counsel for OP-2 submitted that the sub-distributors of *Vivo*, including the Informants, have the option of undertaking the distributorship of several brands including those of its competitors. In fact, the Informants are also sub-distributors for the *Oppo* brand, the policies of which, as stated by the Informants, are quite similar to those of OP-1 *qua* the issue of MOP and MIP but no such complaint exists in this regard. The Informants in the instant case were not captured customers as the distributorship agreements signed by the Informants with OP-1 do not cause any lock-in. Furthermore, OP-1 does not possess sufficient market power to impose any anti-competitive terms on the Informants.
18. Further, the counsel for OP-2 argued that *Vivo*, *Oppo*, *Oneplus* and *Realme*, though in the same industry, are owned by different legal entities. It has been wrongly stated by the Informants that the Commission should consider the market share of *Vivo*, *Oppo*, *One Plus* and *Realme* brands, in a combined manner, as forming part of the BBK.
19. The Commission has carefully analysed the information filed by the Informants, written submissions of the OPs, the documents filed by both parties, oral submissions made by the parties on 28.03.2019 and the information available in public domain.
20. The Commission notes that allegations of the Informants against the OPs pertain to contravention of Section 3 (4) of the Act which provides that 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; (e) resale price maintenance, shall be an agreement in contravention of provisions of the Act, if such agreement causes or is likely to cause an appreciable adverse effect on competition in India.

21. The Commission observes that in the instant case, no doubt, there was an agreement between OP-1 and the Informants, in the form of ‘secondary distribution agreement’. Further, the parties to the agreement are in a vertical chain of supply and distribution of *Vivo* smartphones. However, in order to assess whether such agreement/ any clause(s) of agreement is anti-competitive and causes or is likely to cause AAEC in markets in India, the relative market power of the OPs is to be looked into and thereafter the factors provided under Section 19(3) of the Act need to be examined.
22. As regards relative market power, the Commission notes that OP-1 has furnished a report of International Data Corporation (“**IDC**”), according to which the market shares of smartphone brands are as below:

Table 1: India Smartphone Market Share (%)

S. No.	Company	2018 Q2	2018 Q3	2018 Q4
1	Xiaomi	29.7%	27.3%	28.9%
2	Samsung	23.9%	22.6%	18.7%
3	Vivo	12.6%	10.5%	9.7%
4	Oppo	7.6%	6.7%	7.1%
5	Others	26.2%	32.9%	35.6%

23. The Commission has also looked into the shipment market share of various smartphone manufacturing companies in India as available in public domain which is as follows:



Table 2: India Smartphone Shipments Market Share (%)

S. No.	Company	2018 Q2	2018 Q3	2018 Q4	2019 Q1
1	Xiaomi	28%	27%	27%	29%
2	Samsung	28%	22%	20%	23%
3	Vivo	12%	10%	10%	12%
4	Oppo	9%	8%	7%	7%
5	Others	23%	33%	36%	29%

(Source: <https://www.counterpointresearch.com/india-smartphone-share/> and <https://www.counterpointresearch.com/chinese-brands-capture-record-66-indian-smartphone-market-q1-2019/>)

24. In terms of relative market share as above, the Commission observes that the OPs in the instant case do not appear to command a position which can have enough influencing power to adversely affect competition in India.
25. The Commission observes that during the course of arguments the counsel for the Informants also submitted that concentrating only on the market shares of *Vivo* is an inaccurate representation of the market and that the market shares of other brands forming a part of the entire BBK group, comprising *Vivo*, *Oppo*, *OnePlus* and *Realme* should be considered for AAEC analysis. OP-1 while disagreeing with the claim of the Informants submitted that its shares are held by two individuals in their personal capacity, namely Mr. Hexi and Mr. Tangwensheng with 99.9% and 0.1% shareholding, respectively. OP-2 has submitted that its shares are held by Multi Accord Limited (a Hong-Kong based entity) and Aruna Sharma. Multi Accord Limited is solely held by Lucky City International Limited (a Hong Kong based entity).
26. Based on above, the Commission observes that no evidence of any controlling influence of BBK Enterprise on the economic activities of OP-1 and OP-2, has been furnished by the Informants. The Commission notes that OP-1 has stated that the brands *Vivo* and *Oppo* have independent marketing teams and are competitors in the market for sale and distribution of smartphones in India and that BBK Enterprise does not have any director(s) on the board of directors either of OP-1, OP-2 or OP-3, thereby resulting in autonomy in decision making in *Vivo*. There is no material on record to refute these



contentions of the OP. Therefore, the contention of the Informants that combined market share of *Vivo*, *Oppo*, *OnePlus* and *Realme* be taken to determine market power, is not tenable.

27. In addition, the Commission has also examined the grievance of the Informants to find out whether the agreement between the OPs and the Informant has caused or is likely to cause AAEC in markets in India.

a) **Allegation with respect to Restriction on online sales**

- i) The Informants have alleged that the OPs, by restricting them from selling *Vivo* branded mobile handsets and accessories to consumers *via* online retail portals curtailed their freedom of trade. Further, such restriction directly limits and withholds supply of *Vivo* products in the market, and the consumers do not have the option to buy the same through online retail platforms. Furthermore, OP-1 is restricting the Informants from maximizing their sales and is limiting their ability to compete with other distributors of *Vivo* products who operate in the market. As per the informants, such anti-competitive conditions amount to exclusive distribution agreement, which is violative of Section 3(4) (c) of the Act.
- ii) On perusal of the information available in the public domain the Commission notes that *Vivo* products are readily available online on various e-commerce portals like www.Flipkart.com, www.Amazon.in, www.Snapdeal.com etc. Further, the OPs also have a dedicated e-shopping portal, namely <http://shop.vivo.com/in/>, where their products can be purchased by any consumer. The Commission also notes that the Primary Distribution Agreement between OP-1 and OP-2 is in respect of offline sales and not with respect to online sales of products. Since no rights for online sales has been given to OP-1, the question of restricting online sales by OP-1, with respect to sub-distributors, such as the Informants, would not arise. The Commission also notes that there are no exit barriers for the Informants; if they are not agreeable with this policy of OP-1, they are free to exit from the agreement and opt out of this distributorship.



iii) In the case of *M/s K.C. Marketing Vs. OPPO Mobiles MU Private Limited*. (Case No. 34 of 2018, Order dated 08.11.2018), when there was an opportunity to look into somewhat similar issues, the Commission observed as under:

“.....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 its 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, paytm mall etc. at discounted rates. Also, as noted above, by such restriction, no inter-brand or intra-brand competition has been restricted.....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.”

iv) In view of the foregoing, the Commission observes that the restriction on online sales on the distributors/retailers by OP-1, does not directly withhold the supply of *Vivo* products in the market, and consumers have the option to buy such products through online retail platforms as well. Such a clause in the Secondary Distributorship Agreement between the parties is not likely to cause AAEC in the market for sale and distribution of smartphones in India. The Commission, accordingly, finds no contravention of the provisions of Section 3(4) (c) of the Act on the part of the OPs as far as allegations of restriction on online sales is concerned.

b) Allegation as regards MIP

- i) On the issue of MIP, the Informants have submitted that the OPs were collectively enforcing their illegal policy of allocating territories for their dealers, and penalizing the distributors/retailers in the event they were found to be indulging in market infiltration, in gross violation of Section 3(4)(c) of the Act.
- ii) Upon perusal of the provisions of the aforementioned Distributor Agreement entered into by the parties and adverting to the contentions raised by both the parties, the Commission notes that it is evident that OP-1 has enforced MIP on



the Informants. The OPs have, however, sought to justify MIP on the premise that the system of tracking of IMEI numbers helps in prevention of duplication of the smart phones and in checking counterfeits, since it is possible that the IMEI number can be removed, obliterated or altered by a technical person using special equipment or with the help of software.

iii) The Commission, on this aspect, in *M/s K.C. Marketing Vs. OPPO Mobiles MU Private Limited.*, (Case No. 34 of 2018, Order dated 08.11.2018) has observed the following:

“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.”



iv) The Commission notes that Informants have not refuted the submission of the OPs that no restrictions have been placed on Informants in dealing in other brands either within or outside the allocated territory as has also been held in the above referred decision of the Commission. In the light of these facts, the Commission observes that in the instant matter the MIP does not appear to have caused or is likely to cause AAEC in the market for sale and distribution of smart phones in India and consequently, no case is made out for contravention of Section 3(4)(c) of the Act.

c) Allegation as regards MOP violation

- i) The Informants on the issue of MOP have alleged that the practice of the OPs mandating a MOP is explicitly resulting into Resale Price Maintenance (“RPM”) which is anti-competitive and is in contravention of Section 3(4)(e) of the Act.
- ii) In this regard, the Commission notes that there are sufficient number of distributors/retailers from whom the consumers can purchase *Vivo* smart phones. The consumers also have an option of purchasing the smartphones online through various e-commerce platforms at competitive prices. In the present case, though the clause(s) of the distributor agreement mandate MOP, its adverse effect on competition has not been established by the Informants. The imposition of RPM through the MOP Policy does not appear to have caused AAEC in the market for sale and distribution of smartphones in India since there is intense inter-brand competition in the said market in India. Further, the Informants had complete flexibility to move away from the *Vivo* brand in case they did not wish to abide by the policies of OP-1. The distributors had autonomy and plethora of options to select any other mobile brand for their business. The Commission observes that there exist no exit barriers in the case to say that the Informants were forced to maintain business relationship and continue with the existing arrangement.
- iii) The Commission further observes that the market of smart phones is highly competitive with presence of many players. New brands of smart phone are being launched frequently. The available information suggests that there is enough



competition in the market to discipline an enterprise from imposing restrictive conditions on a downstream market player.

28. The Commission further observes that *Vivo* smartphones are adequately available in both the offline market as well as on online market like *Flipkart*, *Snapdeal*, *Amazon*, *Paytm mall*, official *Vivo* e-store etc. When looked in terms of various factors mentioned in Section 19(3) of the Act, the Commission notes that there is no restriction on the Informants in dealing with other brands of smartphones. There are neither any entry or exit barriers nor foreclosure of competition in the market. No consumer harm is also evident because of restrictions alleged to have been placed by the OPs upon the Informants due to high inter-brand competition and availability of smartphones of many brands, manufactured by different companies.
29. In view of the same, the Commission finds no competition concern in the entire matter. Consequently, the allegation of the Informant, as regards contravention of various provisions of Section 3(4) of the Act by the OPs is not made out.
30. The Commission notes that in addition to the aforesaid allegations, the Informants have also alleged that from admission of the OP-1 in its response dated 19.11.2018, it appears that the OPs are facilitating a cartel at the retailer level under the aegis of the All India Mobile Retailers Association, in violation of Section 3(3) of the Act. However, the Commission observes that the Informants have merely raised a general allegation during the proceedings without substantiating the same with any evidence whatsoever and the same has been controverted by the OPs stating that no retailers or AIMRA has been impleaded in the matter by the Informant. The Commission accepts the contention of the OPs in this regard and also observes that in the absence of any tangible evidence that the OPs through their acts and conducts are facilitating a cartel amongst the retailers, no case has been made out for contraventions of the provisions of Section 3(3) of the Act against the OPs.



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

32. Secretary is directed to communicate the order to the parties accordingly.

Sd/-
(Ashok Kumar Gupta)
Chairperson

Sd/-
(U.C. Nahta)
Member

Sd/-
(Sangeeta Verma)
Member

New Delhi
Date: 19/06/2019