Case No. 50/2013

In Re:

Micromax Informatics Limited
Address: Micromax House, 697, Udyog Vihar,
Phase - V, Gurgaon, Haryana - 122015. Informant

And

Telefonaktiebolaget LM Ericsson (Publ)
Address : Ericsson Forum, DLF Cybercity,
Sector 25 A, Gurgaon, Haryana - 122002. Opposite Party

CORAM:

Mr. Ashok Chawla
Chairperson

Dr. Geeta Gouri
Member

Mr. Anurag Goel
Member

Mr. M. L. Tayal
Member

Mr. S. L. Bunker
Member

Present: Mr. C. S. Vaidyanathan, Senior Advocate, with Mr. Ravisekhar Nair, Ms. Shivangi Sukumar, Ms. Pratibha Singh, and Ms. Saya Chaudhary, Advocates.

Order under Section 26(1) of The Competition Act, 2002

1. The present information filed under Section 19(1)(a) of the Competition Act, 2002 (the '**Act**') by Micromax Informatics Limited ('**Micromax**'). The Informant claims itself to be the world's 12th largest mobile handset manufacturer, having started its operations in India in 2008 and with ground breaking technologies coupled with affordable prices for mobile phones. The Opposite party, Telefonaktiebolaget LM Ericsson (Publ)

(‘**Ericsson/Opposite Party’**), founded in 1876 under laws of Sweden and a parent company of the Ericsson group, is one of the world’s largest telecommunication companies, having a global market share of 38%. Ericsson is engaged in business of manufacturing network/base station equipment and telecommunication networks. Ericsson, on its official website, claims to have 33,000 patents to its credit, with 400 of these patents granted in India, and the largest holder of ‘Standard Essential Patents for mobile communication.’

2. The Informant has alleged that the OP was demanding unfair, discriminatory and exorbitant royalty for its patents regarding GSM technology. The royalty demanded by Ericsson was excessive when compared to royalties charged by other patentees for patents similar or comparable to the patents held by Ericsson.

3. The Informant received a notice from OP on 03.11.2009, alleging that the informant had infringed essential GSM patents of OP. OP demanded that Informant should secure the licences of these patents on Fair, Reasonable and Non-Discriminatory Terms (**FRAND Terms**). No details of the patents so infringed by the Informant were provided by the OP.

4. As per the informant, OP sent a similar notice to the informant again on 29.06.2011, repeating its demand that informant should secure FRAND licences from OP. OP also mentioned in the above said letter to the Informant that it was intimating Securities Exchange Board of India about Informant’s activities of infringing the patents of OP, which may be relevant to safeguard interests of future investors in Informant’s upcoming public issue. Informant made a request for details of the FRAND licences from the OP, but the same were not provided. However, thereafter Informant at the instance of the OP entered into a Non-Disclosure Agreement with OP on 16.01.2012. The terms of the FRAND licences were disclosed to the Informant after this agreement for the first time on 05.11.2012, i.e. after almost 16 months of request made by the Informant in July, 2011. OP further demanded that the Informant should accept licences on FRAND terms within 25 days, otherwise it will be

construed as refusal to sign FRAND licence agreement. The royalty rates imposed by the OP were as under:

a) GSM - 1.25% of sale price of product of the Informant,
b) GPRS - 1.75% of sale price of product of the Informant,
c) EDGE - 2% of sale price of product of the Informant,
d) WCDMA/HSPA: Phones, Tablets - 2% of sale price of product of the Informant,
e) Dongles - USD 2.50 per dongle.

5. OP thereafter instituted a civil suit against the Informant, being C.S. (OS) 442/2013, before High Court of Delhi, alleging infringement of eight Standard Essential Patents (**SEP**s), used in 2G, 3G and 4G devices. The Single Bench of the High Court passed an ad interim ex-parte order in favour of the OP. The Court also directed the Custom Authorities that as and when a consignment was imported by Micromax, Ericsson should be intimated, and objections of OP be decided under Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007.

6. On appeal against the above order preferred by Informant, the Division Bench clarified that the directions of the Single Judge would not be read as an opinion prima facie in favour of either party.

7. The Single Judge recorded an interim arrangement between the parties, as per which the Informant started payment of the royalties to OP from 19.03.2013, at the rates demanded. The High Court in its order passed on 10.04.2013, also appointed an Arbitrator and directed the parties to enter into mediation talks. The OP was also directed to show agreements of similarly placed parties to Informant’s representatives and directed that Informant shall not reveal the terms of these agreements to anyone in any jurisdiction. OP failed to provide agreements of similarly placed parties to the Informant. As a result, mediation proceedings failed and High court directed that interim arrangement would continue until disposal of application for interim

injunction. As per the interim arrangement, the Informant had deposited INR 29.45 crores towards payment of royalty, as on 31.05.2013.

8. The Informant had submitted before the Commission that OP abused its dominant position by imposing exorbitant royalty rates for SEPs, as it is well aware that there was no alternate technology available and OP was the sole licensor for the SEPs of globally acceptable technology standards. The Informant argued that royalty rates imposed by the OP were not product based i.e. royalty was not being charged on the basis of cost of product licensed but was being charged on the basis of value of the phone in which product of the OP was being used and the Informant had to pay a percentage of cost of the phone as royalty. The OP had arbitrarily imposed royalty on basis of sale price of the phone, while the royalty should be charged on basis of value of technology/chipset used in the phone. Due to this, royalty for use of same chipset in a smart phone is more than 10 times the royalty for ordinary phone, while the chipset gives no additional value to a smart phone, then it gives to an ordinary phone. Such misuse of SEPs would ultimately harm consumers. The Informant also submitted that OP had subjected all its present as well as prospective licensees to Non-Disclosure agreements, naming the disclosure of commercial terms between similarly placed patent seekers, which also shows that royalty being charged from the Informant may be many times the royalty being charged from others.

9. The OP in its written submissions placed before the Commission, argued that Informant had taken different stands before the Commission and High Court of Delhi. Informant had started making payments of the royalty as per the interim arrangement recorded by the Delhi High court, still Informant challenged the same royalty rates as exorbitant before the Commission. Further, the OP had alleged that the present dispute was of commercial and civil nature and the Commission should not acquire the role of a price setter or concern itself with excessive prices. The OP had also argued that seeking of injunction from court does not constitute abuse of dominance.

10. The Commission considered all the material on record and the arguments addressed by the Advocates for both the Parties.

11. Ericsson is the member of a Standard Setting Organisation, namely European Telecommunications Standards Institute (**ETSI**), a non-profit organization with more than 700 member organizations from 62 countries from 5 continents and is officially recognized by the European Union as a European Standards Organization. ETSI produces globally applicable standards for information and communication technologies i.e. fixed, mobile, radio, converged, broadcast and internet technologies, some of which are covered by patents held by ETSI or ETSI members like Ericsson. Standardisation is a voluntary process wherein a number of market players reach a consensus for setting 'common technology standards' under the support of a Standard Setting organisation, which in the present case is ETSI. In simple terms, standardisation is the process of developing and implementing technical standards. Such technological standards are termed as Standard Essential Patent, when they are patented and for which there are no non-infringing alternatives. Once a patent is declared as Standard Essential Patent, it faces no competition from other patents until that patent becomes obsolete due to new technology/inventions.

12. As per clause 6 of ETSI IPR policy, an IPR owner is required to give *irrevocable written undertaking*, that it is prepared to grant irrevocable licences on FRAND Terms, **to be applied fairly and uniformly to similarly placed players**. The patent owner has to grant irrevocable licence to the following extent:

a) Manufacture, including the right to make or have made customized components and sub-systems to the licensee's own design for use in manufacture;
b) Sell, lease, or otherwise dispose of equipment so manufactured;
c) Repair, use, or operate equipment; and
d) Use methods

13. FRAND licences are primarily intended to prevent Patent Hold-up and Royalty Stacking. Patent Hold-up is one of the serious problems faced by the information and communications industry worldwide. The usefulness of complex products and services often depends on the interoperability of components and products of different firms. To enhance the value of these complex products, competing manufacturers, customers and suppliers – participate in standard-setting practices to set technological standards for use in designing products or services. When such standard technologies are protected by patent rights, there is a possibility for "hold-up" by the patent owner – a demand for higher royalties or more costly or burdensome licensing terms than could have been obtained before the standard was chosen. Hold-up can subvert the competitive process of choosing among technologies and undermine the integrity of standard-setting activities. Ultimately, the High costs of such patents get transferred to the final consumers. Similarly, royalty-stacking is when a single product uses many patents, of same or different licencors. As such, from the perspective of the firm making the product, all the different claims for royalties must be added or "stacked" together to determine the total burden of royalty to be borne by the manufacturer.

14. In the present case, Ericsson declared to ETSI that it has patents over 2G, 3G and EDGE Technology and these patents are 'Standard Essential Patents'. As per its undertakings, Ericsson is required to offer and conclude licences with patent seekers on FRAND Terms. Ericsson's patents having been accepted by Department of Telecommunication, India and every telecom service provider in India is required to enter into a 'Unified Access Service License' Agreement with Department of Telecommunication (**DoT**). As per letter dated 03.10.2008, DoT has directed that All GSM/CDMA network equipment imported into India should also meet the standards of international telecommunication technology, as set by International Telecommunication Union, Telecommunication Engineering Center and International Standardization bodies such as 3GPP, 3GPP-2, ETSI, IETF, ANSI, EIA, TIA, IS.

15. In the present case, the SEPs owned by OP are in respect of the 2G, 3G and 4G patents used for smart phones, tablets etc., which fall under 'GSM' technology. As such, prima facie the relevant product market would be the SEP(s) in GSM compliant mobile communication devices. The Informant has contended dominance of Ericsson in the Indian markets and the relevant geographic market would be the territory of India. The relevant market thus would be the SEP(s) in GSM complaint mobile communication devices in India.

16. From the perusal of the Information and the documents filed by the Informant, prima facie it is apparent that Ericsson is dominant in the relevant market of GSM and CDMA in India and holds large number of GSM and CDMA patents. Ericsson has 33,000 patents to its credit, with 400 of these patents granted in India, and the largest holder of SEPs for mobile communications like 2G, 3G and 4G patents used for smart phones, tablets etc. Further, since the OP holds SEPs and there is no other alternate technology in the market, OP enjoys complete dominance over its present and prospective licensees in the relevant product market. As such, OP can be said to be dominant.

17. The allegations made in the information and not refuted by OP concerning royalty rates make it clear that the practices adopted by the OP were discriminatory as well as contrary to FRAND terms. The royalty rates being charged by the OP had no linkage to patented product, contrary to what is expected from a patent owner holding licences on FRAND terms. The OP seemed to be acting contrary to the FRAND terms by imposing royalties linked with cost of product of user for its patents. Refusal of OP to share commercial terms of FRAND licences with licensees similarly placed to the informant, fortified the accusations of the Informant, regarding discriminatory commercial terms imposed by the OP. For the use of GSM chip in a phone costing Rs. 100, royalty would be Rs. 1.25 but if this GSM chip is used in a phone of Rs. 1000, royalty would be Rs. 12.5. Thus increase in the royalty for patent holder is without any contribution to the product of the licensee. Higher

cost of a smartphone is due to various other softwares/technical facilities and applications provided by the manufacturer/licensee for which he had to pay royalties/charges to other patent holders/patent developers. Charging of two different license fees per unit phone for use of the same technology prima facie is discriminatory and also reflects excessive pricing vis-a-vis high cost phones.

18. The issues raised before the High Court by OP are in respect of infringement of its IPR rights. The Informant has every right to raise issues before the Commission. Section 62 of the Act makes it clear that provisions of Competition Act are in addition to and not in derogation of other existing laws. Section 3(5) of the Act protects IPR rights of a person, subject to reasonable conditions. Section 4(1) prohibits abuse of dominant position by an enterprise. Section 4(2) provides that imposition of unfair and discriminatory conditions in purchase or sale of goods or services amounted to an abuse of dominant position. Thus this Commission has obligation and jurisdiction to visit the issues of competition law. Pendency of a civil suit in High Court does not take away the jurisdiction of the Commission to proceed under the Competition Act.

19. In view of above discussion, the Commission is of the opinion that it was a fit case for through investigation by the DG into the allegations made by the Informant, and violations, if any, of the provisions of the Competition Act.

20. The Secretary is directed to send a copy of this direction passed under section 26(1) to the office of the DG. DG shall investigate the matter about violation of the provisions of the Act. In case, the DG finds opposite parties/companies in violation of the provisions of the Act, it shall also investigate the role of the persons who at the time of such contravention were incharge of and responsible for the conduct of the OPs so as to fix responsibility of such persons under section 48 of the Act. DG shall give opportunity of hearing to such persons in terms of section 48 of the Act. The report of the DG shall be submitted within 60 days from receipt of the order.

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

21. The Secretary is directed to inform the parties accordingly.

New Delhi
Date 12/11/2013

Sd/-
(Ashok Chawla)
Chairperson

Sd/-
(Dr. Geeta Gouri)
Member

Sd/-
(Anurag Goel)
Member

Sd/-
(M. L. Tayal
Member

Sd/-
(S. L. Bunker)
Member