



Case No. 78 of 2013

In Re:

Dish TV India Limited
FC – 19, Sector – 16A, Noida -201301, U.P.

..... **Informant**

And

Hathway Cable & Datacom Limited
'Rahejas', 4th Floor,
Corner of Main Avenue & V.P. Road,
Santacruz (West), Mumbai- 400054

..... **Opposite Party No. 1**

Gujarat Telelink Private Limited
58, Professors Colony, Navrangpura,
Ahemdabad – 380061

..... **Opposite Party No. 2**

Fastway Transmission Private Limited
and its Group Companies
Lajjya Tower, Near E.P.F. Building, Sham Nagar,
Ludhiana- 141002

..... **Opposite Party No. 3**

DEN Networks Limited
236, Okhla Industrial Estate, Phase- III,
New Delhi - 110020

..... **Opposite Party No. 4**

Sumangali Cable Vision
Murasoli Maran Towers, 73 MRC Nagar
Main Road



Competition Commission of India



MRC Nagar, Chennai – 600028,
Tamil Nadu

..... **Opposite Party No. 5**

Siti Cable Network Limited
Building No. FC 9, Gate No. 3,
Sector 16 A,
1st Floor, Film City, Noida- 201301
U.P.

..... **Opposite Party No. 6**

CORAM

Mr. Ashok Chawla
Chairperson

Dr. Geeta Gouri
Member

Mr. Anurag Goel
Member

Mr. M. L. Tayal
Member

Mr. S. L. Bunker
Member

Present: Informant through their Counsel Shri Amitabh Kumar, Advocate.

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

The Informant is a Direct-to-Home (‘DTH’) operator in India. The Opposite Parties are Multi System Operators (‘MSOs’), operating in various states in India.



2. The Informant's allegations, *inter alia*, relate to charging of high carriage and placement fee and under reporting of subscribers by the Opposite Parties, *vis.-à-vis*. Broadcasters. The Informant contended that the same amounts to abuse of dominance under the provisions of Section 4 of the Competition Act, 2002 (the 'Act').

3. The Informant submitted that the Opposite Parties in abuse of their position of dominance, were forcing broadcasters to pay high carriage and placement fee for carrying and placing their channels. The payment of such high fees by broadcasters was reducing the Opposite Party's net content cost, *vis-a vis* competitor's namely DTH operators. By this mode, the MSOs were destroying the level playing field and the DTH operators were unable to compete despite having a more efficient technology and a better quality product.

4. The specific allegations made by the Informant against the Opposite Parties relate to:

- i. Charging exorbitantly high carriage fee from broadcasters for carrying the channels on their cable network;
- ii. Charging high placement fee for placement of channels on the desired bandwidth on their cable network;
- iii. Retaining a disproportionate share of the subscription revenue and not allowing its equitable distribution in the value chain;
- iv. Under reporting subscriber numbers, thereby distorting subscription revenue figures;
- v. Paying effectively negligible net content cost as compared to its competitors.

5. Ultimately, the Informant alleged violation of the provisions of Section 4(1) read with Section 4(2)(a)(i), 4(2)(c) and 4(2)(b)(i) of the Act.



6. The Informant submitted that it was in direct competition with the Opposite Parties in the “markets for broadcast carriage services within different states”.

7. A perusal of the material and information on record shows that the allegations of the Informant do not pertain to abused of dominance by any one of the Opposite Parties in a specific geographic region. The Informant has attributed collective dominance to all the Opposite Parties together, in the geographical markets of their operation and collective abuse. Therefore, the question is whether Section 4 of the Act, covers abuse of collective dominance. Section 4 of the Act, provides:

“(1) No **enterprise or group** shall abuse its dominant position”

.....

Explanation – For the purposes of this section, the expression –

.....

(c) “group” shall have the same meaning as assigned to it in clause

(b) of the Explanation to Section 5.” (Emphasis added)

Further, the Explanation to Section 5 of the Act, defines ‘group’ as follows:

‘group’ means two or more enterprises which, directly or indirectly, are in a position to –

- i. exercise twenty-six percent or more of the voting rights in the other enterprise;
- or
- ii. appoint more than fifty percent of the members of the board of directors in the other enterprise; or
- iii. control the management or affairs of the other enterprise;”

8. Appraisal of Section 4 and 5 makes is abundantly clear that Competition Act, 2002 covers dominance of one enterprise or a group of enterprise (satisfying the conditions laid down in the proviso to Section 5). The Commission in the case of *Consumer Online Foundation*



Informant vs. Tata Sky Limited & Ors. (Case 2/2009) covered the aspect of ‘collective dominance’ and observed:

“.....It further observed that Indian law does not recognize collective abuse of dominance as there is no concept of ‘collective dominance’ which has evolved in jurisdictions such as Europe. The word ‘group’ referred to in Section 4 of the Act does not refer to group of different and completely independent corporate entities or enterprises. It refers to different enterprises belonging to the same group in terms of control of management or equity..... But the concept of dominance does centre on the fact of considerable market power that can be exercised only by a singly enterprise or a small set of market players..... It is noteworthy that the Competition Act uses the article “an” and not “any” before the word “enterprise” in subsection (2) of Section 4. For a plural interpretation of “an” the combined entity should be an identifiable artificial juridical person such as association of persons (AOP) or body of individuals (BOI) mentioned in subsection (1) of section 2 of the Act. That is why the Act includes the term “group” separately because a “group” of firms with joint management control can have collective decision making and can exercise joint dominance. In this case, the respondents cannot be said to be AOP or BOI. Therefore, they cannot be said to be “an enterprise” for the purpose of Section 4. 19.1”.

9. The cases referred to by the Informant namely *General Motors Continental LV vs. Commission of European Communities*, *Hoffman-La Roche & Co. AG vs. Commission of European Communities* and *Sirena S.r.l & Ors* merely refer to broad principles of European Competition Law, and is not applicable to Indian Competition Act, 2002. Hence the ratio laid down is not relevant to the facts of present case. USDOJ decision in *Merger Approval for merger of Sirius Satellite Radio Inc. and XM Satellite Radio Inc.* is also not relevant to the facts of the present case.



Competition Commission of India



10. In view of the above discussion, there does not exist a *prima facie* case for causing an investigation to be made by the Director General under Section 26(1) of the Act. It is a fit case for closure under 26(2) of the Act and the same is hereby closed.

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

New Delhi

Dated: 06/03/2014

Sd/-
(Ashok Chawla)
Chairperson

Sd/-
(Dr. Geeta Gouri)
Member

Sd/-
(Anurag Goel)
Member

Sd/-
(M. L. Tayal)
Member

Sd/-
(S. L. Bunker)
Member