COMPETITION COMMISSION OF INDIA

29.06.2010

Case No. 10/2009

Informant Internet Service Providers Association of India(ISPAI), New Delhi

Opposite Party Department of Telecommunications (D o T), New Delhi.

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

This Information has been filed by the Informant on 13.10.2009 and was considered by the Commission in its meeting held on 27.10.2009. The Commission decided to request the opposite party for its views in the matter. The opposite party sent its views vide its letter dated 3.12.2009. Subsequently, the Informant was also given opportunity to present its views/comments before the Commission. The Informant appeared before the Commission through counsel on 9.2.2010 who made detailed submissions and requested to file an amended information. The amended information was filed on 10.3.2010 which was dicussed in the meeting of the Commission on 25.3.2010 when the Informant was also present. Subsequently Informant filed additional information on 21.4.2010 and made oral submissions regarding the same in the meeting of the commission held on 4.5.2010.

2. Brtief facts of the case as stated by the Informant are as follows:-

2.1 The Informant is a registered association of various Internet Service Providers (ISPs) in India. The information relates to alleged discrimatory behaviour of the Department of Telecommunication (Opposite Party) in providing permission for internet telephony services.

2.2. The opposite party is responsible for grant of licenses to operators for providing basic and value added services in the telecom sector in the country. It has been

alleged that opposite party has imposed discriminatory restrictions on Internet Service Providers(ISPs) in providing internet telephony services. Whereas, Unified Access Service License (UASL), Basic Service Operators(BSO) and Cellular Mobile Telephone Services (CMTS) licensees have been allowed to provide unrestricted internet telephony services to their subscribers, the same has not been permitted to internet service providers. UASL, BSO and CMTS licencees are not launching/promoting internet telephony services for fear of bringing down call charges which would hurt their existing revenue model. Possible competition from ISPs has been prevented by not permitting them to provide unrestricted internet telephony services. ISPs are not allowed to offer connectivity with Public Switched Telephony Network (PSTM)/ Public Land Mobile Network (PLMN). In otherwords ISPs are not allowed to connect to regular land lines phones or mobile phones. Such restrictions are not imposed on UASL/CMTS licencees. Thus Department of Telecommunications is abusing its dominant position as a licensing authority.

2.3. It has also been pointed out that the conduct of UASL/CMTS service providers is in violation of Sec 3(1) and 3(3) of the Competition Act, 2002 as despite being vested with rights to provide internet telephony services they are not doing so. This results in limiting the market for the provision of internet telephony services and thereby deprives the consumers of a viable and cheaper alternative. It has also been alleged that Department of Telecommunication is providing telecom services itself through its unit Bharat Sanchar Nigam Limited (BSNL). BSNL is a dominant service provider by revenue and it has a legitimate interest alongwith other UASL/CMTS service providers to limit the introduction of internet telephony services into the market for voice telephony. The Informant have stated that permitting ISPs to provide unrestrictive internet telephony will immensely benefit the consumers as well as service providers.

2.4. It has also been stated that Telephone Regulatory Authority of India (TRAI) has recommended that unrestrictive internet telephony services be permitted to ISPs

as in the case of Universal Access Service License/Cellular Mobile Telephone Services License. Despite the recommendations of TRAI, opposite party has not yet permitted unrestrictive internet services to ISPs.

3. The Informant has sought following reliefs:-

I. Directing the institution of enquiry into (i) violation of the provisions of Section 4 by DoT; (ii) violation of the provisions of Section 3(1) and 3(3) of the Competition Act, 2002 by Dot and the UASL/CMTS service providers.

II. Directing the Director General to carry out investigation into the alleged violation of Sections 3 and 4 of the Competition Act, 2002 and to furnish expeditiously the Investigation Report;

III. Direct the Respondent to discontinue and not to re-enter the anti competitive agreements/arrangements and to discontinue the abuse of dominant position;

IV. Declare the anti-competitive agreements void;

V. Impose such penalty on the Respondent as the Commission may deem fit;

VI. Direct the respondents to abide by such other orders as the Commission may pass and to comply with the directions, including payment of costs, if any;

VII. Pass such other and/or further order(s) as the Commission may deem fit and proper in the facts and circumstances of the case.

4. The opposite party has given its detailed comments vide its letter dated 4.12.2009. Briefly their comments may be summarized as under:-

4.1. As per Section 2(h) of the Competition Act, 2002, the opposite party is not covered in the definition of 'Enterprise" with respect to present application of ISPAI. Their contention is that licencing by the opposite party is done under the Indian Telegraph Act, 1885 and this is a "Sovereign function."

4.2. ISP and Access Service Licence (UASL/CMTS/BSO) having different terms of eligibility criteria, entry fee, licence fee and scope of services permitted etc are issued on non exclusive basis to companies fulfilling their eligibility conditions of respective licences. In view of the vast difference in the nature and the scope of Access Service Licence (UASL/CMTS/BSO) and ISP Licence, comparison of scope of the services particularly for provision of internet telephony service is wrong and devoid of facts.

4.3. TRAI recommendations on internet telephony dated 18.8.2008 are under the examination of Opposite Party. This is a policy matter and final decision is yet to be taken by the Government.

5. The Commission has carefully considered the written as well as oral submissions made by the Informant and the written response from the Department of Telecommunications (Opposite Party). As per the Section 4 of the Indian Telegraphs Act, 1885 the Central Government has exclusive privilege and power to grant license. In terms of Section 4 the Government may grant a licence on such conditions and in consideration of such payments as it thinks fit. Government grants various types of telecom licences for provision of variety of telecom services like Access Service Licence (UASL/CMTS/BSO), internet service, national long distance service, international long distance service etc. Each type of licence has different eligibility criteria, entry conditions, licence fee, scope of service etc. Licensees are aware of these conditions when they apply for a particular licence. Licensees are permitted to provide various telecom services as per the scope of their respective licenses without encroaching upon the domain of each other. Further these licenses are issued on non exclusive basis to companies fulfilling the eligibility conditions of the respective lincences. The licenses are, therefore, different products and cannot be compared with each other. Therefore, to contend that non provision of unrestricted internet telephony services to internet service

providers amounts to abuse of dominance is not a tenable argument. Government is well within its right to have different conditions and different services in various types of licenses.

6. The second part of allegation relating to anti competitive practices by the opposite party and UASL/CMTS/BSO licensees in not providing adequate internet telephony service to the consumers also does not hold ground. There is nothing on record to support this contention of the informant.

7. The informant has also stated that TRAI has already recommended their case to the Department of Telecommunications but they are not taking any decision. The reply from Department of Telecommunications clearly states that they have received the recommendations of the TRAI and it is under active consideration of the Department. Since the matter is under the consideration of the Government no further action is required at this stage. However, the Commission feels that a communication may be sent to the Department of Telecommunication suggesting to them to take an early decision in the matter.

8. On the basis of the discussion in the foregoing paras, the Commission is of the view that there exists no prima-facie case for making a reference to Director General for investigation into the matter. As enumerated in para 7 above, the matter is already under consideration of the Government for a decision. Hence, the Commission decides to close the matter forthwith under Section 26(2) of the Competition Act, 2002.

9. Secretary is directed to inform the Informant accordingly.

10. A letter may also be sent to the Department of Telecommunications for taking an early decision on the recommendations of TRAI.

Member(G)

Member(R)

Member(P)

Member(GG)

Chairperson