

COMPETITION COMMISSION OF INDIA

Case No. 08/2009

Dated:30.08.2011

Information filed by:

JAK Communications Pvt. Ltd., Chennai

Against:

Sun Direct TV Pvt. Ltd., Chennai

Order under Section 26(6) of the Competition Act, 2002

The present information has been filed by JAK Communications Pvt. Ltd., Chennai (hereinafter referred to as Informant) on 22.09.2009 under Section 19 of the Competition Act, 2002 (herein after referred as the Act) against Sun Direct TV Pvt. Ltd., Chennai (hereinafter referred to as Opposite Party) for alleged violation of the provisions of the Competition Act, 2002.

2. The facts, in brief, as stated, in the information are as under:

2.1 The informant, a company registered under the provisions of "The Companies Act 1956", is a multi system operator, inter-alia, engaged in the business of collecting signals of satellite TV channel, aggregating these signals and transmitting the same to homes either directly or through local cable operators (LCOs). The informant transmits both free to air channels and pay channels. The Opposite Party, a company, is into the business of Direct to Home Operations (DTH) and receives the signals of various satellite channels and distributes them to subscribers via satellite. The Opposite Party also transmits both pay channels and free to air channels.

- 2.2 The Informant has submitted that it is distributing the TV signals through the cable medium while the Opposite Party (OP) is distributing these signals through the satellite medium. However, since both are the distributors of TV signals, they are the competitors.
- 2.3 The informant has alleged that the Opposite Party is indulging in predatory pricing by giving subsidy to its consumers in respect of DTH services provided by it with a view to eliminating its competitors in violation of provisions of Section 4(2) of the Act. It has also been alleged that OP is also involved in the anti-competitive agreement with its consumers.
- 2.4 As per informant, the OP is providing huge subsidy to the consumers to capture the market. It has been alleged that while OP is spending Rs.4500/- to acquire one customer, it is offering DTH services for Rs.440/- only towards subscription charges for 4 months. Further, while Set Top Box (STB) having MPEG technology has an estimated cost of Rs. 2200 in the market, the OP is not charging anything for it from the consumers.
- 2.5 The Informant has further alleged that the subscription charges of Rs.99/- per month charged by OP from its consumers is far less than the basic price of these channels which is about Rs.156.55 in accordance with the calculations based on circular of TRAI dated 18.04.2008.
- 2.6 According to informant, OP by subsidizing the Set-Top Box and monthly subscription charges for paid channels has acted in contravention of the provisions of the Act causing damage to the informant and other similarly placed persons.
- 2.7 As per the informant, the above-mentioned acts of OP amount to "predatory pricing" and "abuse of its dominant position" in contravention of the provisions of the Act.
3. The Commission considered the matter in its various meetings and having formed an opinion under Section 26(1) of the Act that there exists a prima facie case, referred the matter to the Director General (DG) for conducting investigation vide an order dated 04.03.2010.

Investigation by Director General

4. The DG after receiving the directions from the Commission, got the matter investigated by the Addl. Director General and submitted his report dated 05.04.2011 to the Commission under Section 26 (3) of the Act.

4.1 The DG after considering the information formed a view that the conduct of OP needs to be examined in accordance with the provisions of Section 3 (4) and Section 4 of the Act. The investigation was thereafter conducted in light of these two provisions.

4.2 In course of investigation, DG asked OP to submit name and address of DTH service providers, their viewership details, details of cost incurred by OP for procuring one set of customer premises equipment including a Set Top Box, Dish Antenna etc. In addition, OP was also asked about amount of cost recovered by it from its subscribers, details of the offer of the other DTH Service Providers in the Southern India regarding customer premises equipments, its market share and that of the competitors, amount of subsidy given by it to its subscribers, its shareholding pattern, copies of audited financial statements etc. The OP was also asked to furnish details of subsidiaries and other companies connected with it, their main business activities, names of other states and the union territories where it is marketing DTH system along with number of viewership, and discounts, offered to the subscribers for subscribing the package 'Freedom Package Tamil'.

4.3 The DG has analyzed the relevant product market and relevant geographic market in a very exhaustive manner and dealt with the delineation of the relevant market in great detail. In course of determination of relevant market, DG has also considered various cases decided by European Commission to support his contention. **DG has determined relevant market in the case as the market for DTH services in the whole of India as against TV Channel distribution market**, considering the fact that DTH services and cable TV cannot be regarded as inter changeable or substitutable with each other by reason of characteristics of the product, pricing and intended use based on various parameters such as distribution of TV channels, quality of signals, reliability of transmissions, availability of add-on facilities and interactivity, viewing experience, technology, scalability, various options in the pricing of

product, seamless availability of signals for DTH services throughout India and PAN India presence of all the DTH operators. DG while determining the aforesaid relevant market has considered that the prices of the DTH transmission are different from that of cable transmission. DG has also observed that the picture quality of the DTH transmission is superior as compared to the cable transmission and number of channels transmitted through DTH is also considerably higher. DTH viewers receive the transmission of channels independently from the satellite whereas the cable TV operators receive the signals from the broadcasters through satellite in their control room and thereafter distribute these signals to customers through cables. In addition, DTH services are transmitted digitally and through wireless system.

- 4.4 DG in its report while determining the relevant market has also considered that there is no choice for consumers in selection of the channels in case of cable transmission whereas the choice is given by the DTH service providers. The installation of the DTH in homes requires set top box, dish antenna and remote etc. whereas there are no such requirements for cable installation. Further, spectrum used by these two transmissions is also different. There are many other services like games, video recording etc. provided by the DTH operators, while such type of facilities are not available in cable transmission.
- 4.5 On the issue of dominance of the OP, DG has brought out that there are six DTH operators in India namely, Airtel TV, Dish TV, Videocon, Big TV, Tata Sky and Doordarshan other than the OP. Except for Doordarshan, all the above DTH operators provide paid as well as free channels. The service of Doordarshan is restricted to 19 of its own channels and 36 free channels of other broadcasters. As per the news paper report (Financial Express dated 14.02.2011) the total number of DTH subscribers in India are 32.7 millions, out of which OP commands a share of 18.65%. The Airtel, Dish TV and Tata Sky commands a market share of 14.98%, 28.74% and 19.87% respectively. As per the said news report, Dish TV has 9.4 million subscribers followed by Tata Sky with 6.5 million subscribers. OP is having 6.1 million subscribers and ranks third at present. The other DTH service providers namely, Airtel, Reliance Big, Videocon are having 4.9 million, 3.6 million and 2.2 million subscribers respectively. The presence of Doordarshan in the relevant market is also meager compared to the other competitors.
- 4.6 DG has also analyzed size and resources of OP with competitors and has found that all the DTH service providers have been promoted by the top

industrial houses in India and enjoy enormous economic power. While OP is a part of Sun group of companies, Airtel DTH is a part of Bharti Airtel group which has vast resources having a turnover of about Rs. 42,000 crore in F.Y.2009-10. Tata Sky is part of the Tata group which is the largest business house in India and Reliance Big TV is part of Reliance ADAG Group which is at present in mobile Telephony, entertainment, broadcasting, FM channels, and multiplexes. The other two players-Videocon d2h is promoted by Videocon group having a turnover of about Rs.18,000 crore and Dish TV is part of Essel group of companies.

- 4.7 It has also been found by DG that most of the DTH service providers are vertically integrated having wide sales and service network and considering the strength and integration of other competitors, OP does not enjoy any unique position in the relevant market. Further, all the DTH service providers offer almost similar packages targeting the Pan India consumers as well as regional consumers and subscribers of one can always avail services from other DTH service providers. There is no entry barrier also which prevents other operators from gainfully operating in the market.
- 4.8 Based upon above, DG has concluded that OP does not enjoy any dominant position in the relevant market of DTH service in India.
- 4.9 DG has considered various allegations in the information and examined them on two parameters. First, as regards allegation that the agreement of OP with its subscribers for providing a connection at Rs. 440/- for four months and monthly subscription charges of Rs.99/- per month plus taxes is anti-competitive, DG has considered that as OP is supplier of DTH service in India while the customers are the viewers of TV channels, the agreement between the two can be said to be a vertical agreement within the meaning of Section 3(4) of the Act. DG, however, has concluded that subscribers' agreement between Sun Direct TV and its consumers is not in the nature of exclusive supply agreement or refusal to deal since it does not cast a condition on its consumers not to deal with other DTH operators. Analysing the factors laid down in Section 19(3) of the Act, DG has stated that the agreement between OP and its subscribers is neither creating any barriers to the new entrants in the market nor is it driving its existing competitors out of the market. DG has also found that there is no foreclosure of competition in the market for the other DTH operators and there are visible benefits to the consumers in terms of pricing and services. It has also been noted that there has been

improvement in technology and services of DTH operators over last few years.

- 4.10 The DG after conducting exhaustive analysis has come to a conclusion that such an agreement is neither creating any barriers to the new entrants nor is driving the existing competitors out of the market. There is no foreclosure of competition as well due to such agreements and therefore, subscribers' agreement between consumer and Sun Direct TV is not an anti-competitive agreement in terms of Section 3(4) of the Act as the agreement does not cause any appreciable adverse effect on competition in India.
- 4.11 As regards alleged abuse of dominance by OP, DG has analysed the contention of the IP that since the OP is subsidizing the fixed cost of providing a connection to its new customer, charging the monthly subscription and offering its Tamil Freedom Package which is an entry level package at below cost; it is using its dominant position in the DTH market to monopolize the market and to drive out the competitors. However, DG in course of investigation has not found any merit in any of the allegations relating to the subsidizing the cost of the hardware, monthly subscription and the entry level package offer. DG has noted that the allegations of IP are based on the notion that the DTH market is part of the overall market of TV viewing which includes the Cable TV market. However, this notion of the IP is not correct as the market of DTH is separate and distinct.
- 4.12 It has been noted by DG that subsidization of set-top box and other hardware to the consumer is only for the purpose of viewing and ownership rights are not transferred. OP remains the owner of the hardware and retrieves it once the consumers discontinue the subscription. DG has also found that the offerings of competitors of OP of the set-top box and other hardware are more or less similar to the offers of OP and none of the service providers in DTH space is recovering the full cost of the consumer hardware. The DTH service providers have also embedded the cost of packages in the initial installation charges. Further, due to the intense competition in the DTH service, the prices of initial offers have come down drastically in the last three-four years benefiting the consumers. There is no harm to the competitors due to the alleged position of dominance of OP, since Airtel DTH has seen huge increase in its subscriber base in four major states of India. The latest entrant in the market, Videocon d2h has also captured about 79,000 subscribers after its commencement of operations in August-November 2009. The price offered by OP cannot be said to be eliminating or driving out the competitors from the market. Thus, as per DG, there is no abuse in the conduct of OP in

transferring the consumer hardware at subsidized prices. While analyzing this strand of allegation, DG has also concluded that all the DTH service providers are more or less charging the same amount of money on monthly basis from their consumers and it cannot also be said that OP has reduced prices of its service to eliminate competitors.

4.13 As regards the allegation that OP is offering about 130 channels in their basic tier "Freedom Package Tamil" for Rs.99/- per month contrary to the circular of TRAI dated 18.04.2008 whereby the rates of the DTH to the paid channels is to be the 50% of the rates of which these channels are being offered for Non-CAS cable distribution, DG has concluded that the assessment of IP was based on a-la-carte pricing of channels rather than bouquet based pricing system. It has been noted that the packages of all the DTH service providers based on such bouquet pricing are cheaper than the a-la-carte pricing of channels since they negotiate with the broadcasters based on channel bouquet and cost in such case for the DTH service providers comes out to be much less than the a-la-carte pricing. The service providers also pass on the benefits of such wholesale pricing to the consumers. DG has also taken note of the fact details filed by OP during investigation and has held that they are in line with the bouquet prices of various channels available on the TRAI website for the non-CAS areas as on 25.08.2009 by applying a factor of 0.5 as suggested by TRAI. Further, the agreements for the package have also been filed with TRAI by OP.

4.14 After considering the allegations in the information, submissions of the OP and the Informant and other materials collected during course of investigation, the DG has found that there is no violation of any provisions of Section 3 or Section 4 of the Act in the present matter.

5. The Commission considered the investigation report of the DG in its meeting dated 19.04.2011 and decided to send a copy of the investigation report to the parties for filing their replies /objections.

6. The replies, in brief, filed by various parties are as under:

Reply of Informant

- 6.1 The Informant initially after seeking some additional time, finally submitted its replies/objections to the DG report on 15.06.2011, objecting to each and every findings of the investigation report of DG.
- 6.2 As per the Informant, the DG has only relied upon the initial information dated 22.09.2009 provided by it and additional information filed on 27.01.2010 and 09.12.2010 have not been considered. Therefore, the report of DG is incomplete and ought not to be considered by the Commission. The Informant also submitted that the DG has exceeded his jurisdiction since the role of DG is only to collect evidence and material facts and not to frame issues on the subject matter of information, which is the subject matter of Commission alone.
- 6.3 The informant has further submitted that DG has ignored the most important fact that the geographical market in the case is Southern India where OP is having about 70% of the market share and is virtually holding monopoly. Further, the methodology of DG is faulty because it is based solely upon the statement and the information provided by the OP. No independent investigation has been carried out by the DG to arrive at right conclusion, a detailed market study has not been carried out and statement of other stakeholders was not called for to arrive at correct conclusions. DG has framed his opinion first and then investigated the matter, which is bound has led to incorrect conclusion.
- 6.4 Based upon the above averments, the IP has requested that the investigation may be set aside.

Replies of Respondents

- 6.5 The OP filed its replies/ rejoinder dated 11.05.2011 and 21.06.2011 to the objections filed by the Informant in which it has denied each and every allegation levelled against it by the Informant.
- 6.6. The OP in its reply dated 11.05.2011 has submitted that the IP provides a non-addressable platform and operates in some parts of Chennai while OP is Pan India 100% addressable DTH operator. There are differences in regulatory treatment, different trading relationship, different conditions of competition and the service offerings. The OP

has submitted that the relevant market in this case is the National Market for retail distribution of Pay TV.

- 6.7 The OP has also submitted that analogue Cable TV sector is the dominant incumbent in the retail distribution of pay TV market in India with over 85% market share. Non-addressable cable sector enjoys significant market power owing to last mile connectivity and massive under-declaration levels. The prevalent under-declaration levels to the tune of 90% acts as a competitive restraint for DTH services and hinder level playing field. In this backdrop and considering that DTH industry is in nascent stage, DTH business model adopted by all DTH operators is to minimize the entry cost and recover the subsidy provided to the consumers over a period of time. In light of these facts and that cable TV sector is the dominant incumbent in the retail distribution of pay TV market, OP has submitted that it does not enjoy any position of dominance.
- 6.8 On the point of providing about 130 channels for Rs.99/-, OP has submitted that in its Tamil Freedom Pack, which consists of pay channels, free to air channels and DD channels, it provides only 23 pay channels for monthly subscription of Rs.99 plus taxes which is Rs.110/- per month. The other DTH operators provide about 45 pay channels for a lesser price. The IP also provides about 45 channels worth Rs.522/- per month at the lower rate of Rs.120/- per month to the customer. Further, connection at Rs.440/- with monthly subscription charges of Rs.99/- is in line with the entire DTH market, which with a view to establishing itself in the cable and satellite market, has been offering certain discounts with regard to the hardware required for the service. Denying the charge of predatory pricing, it has been argued that OP it is a new entrant and is offering service/channels at a price that is competitive with the other DTH operators and even with the Informant in the interest of consumers and in furtherance of competition.
- 6.9 Concurring with the overall findings of DG, OP has submitted that DG, however, has failed to take note of the fact that Informant has an ulterior purpose or motive in invoking the jurisdiction of the Commission. The OP has requested that the Commission must summarily prevent improper use of machinery in line with the settled position as held by the Apex Court in the case of K.K.Modi vs. K.N.Modi 1998 S.C.1297.

6.10 OP has submitted that the contention of the informant that the DG has not considered all the information provided to him is incorrect and baseless and this has been contended only because the DG has found no merit in the information. The plea of quashing the investigation and re-investigation is not tenable since informant had been given due opportunities and even before the Commission the informant was at liberty to produce/submit additional documents, which has not been done. Further, there is no merit in the contention of the informant that DG should not have framed issues. On the contrary, framing of issues in the case has ensured that investigation has been done in an organized and transparent manner taking into account all elements of the information.

6.11 The OP has also submitted that the relevant market in this case cannot be South India as contended by the informant since it has Pan India presence and in the context of delineation of relevant market OP has invited the attention of the Commission towards the decision of the European Commission in case of MSG Media Services and the decision of the US Supreme Court in the case of Standard Oil Company of California and Standard Stations Inc. vs, United States (337 US 293).

6.12 The OP in light of its arguments has submitted that there has been no wrong doing on its part. It has also submitted that the informant is merely indulging in vexatious and retributory litigation.

7. The Commission has carefully considered the information, the report of DG, oral/written submissions of various parties and other materials available on record. The Commission observes that the allegations in the Information are basically centered on the fact that the OP by abusing its position of dominance is indulging in predatory pricing by giving subsidy to its consumers in respect of DTH services provided by it with a view to eliminating its competitors, though it has also been alleged that OP is also involved in the anti-competitive agreement with its consumers.

8. The Commission has taken note of the objections of the informant that DG has not considered additional information submitted by it, has relied upon the submissions of the respondents and has framed issues even before investigating the full facts. However, after going through the report of investigation of DG, the Commission observes that the objections of the informant in this regard are not tenable since DG has acted upon the information submitted by the informant and has also analysed all the issues raised in the

information in detail. The Commission also observes that the informant was given adequate opportunity to explain its case in course of proceedings before it and there is no case to say that its information was not fully considered.

9. The Commission after carefully going through the investigation report observes that the DG has done an exhaustive analysis for arriving at the determination of relevant market in the instant case and there is no reason to disagree with his findings. The objection of the Informant that the relevant market should be taken as "*distribution of TV signals in Southern India*" is not tenable in light of the definition of relevant market given in the Act. While holding so, the Commission has considered characteristics of various products in the field, their pricing and intended use based on various parameters such as distribution of channels, quality of signals, technology, scalability etc. On the basis of the fact that the cable and DTH platforms are distinct and distinguishable and the players operating in DTH services have Pan India presence; the Commission has held that the relevant market in this case is the provision of DTH services all over India.

10. On the issue of dominance, the Commission has considered explanation (a) to Section 4 and various factors mentioned in Section 19(4) of the Act to assess whether OP enjoys a position of dominance. It has been observed that there are six DTH operators in India other than the OP. Among the existing players, except for Doordarshan which provides free to air channels, all other operators provide paid as well as free channels. The Commission has also considered the news paper report (Financial Express dated 14.02.2011) relied upon by the DG in his report in which the total number of DTH subscribers in India has been stated to be around 32.7 millions; out of which OP commands a share of 18.65% as against Airtel, Dish TV and Tata Sky which command a market share of 14.98%, 28.74% and 19.87% respectively. The OP ranks third at present.

11. The Commission has also found that except for Doordarshan, all the existing DTH service providers have been promoted by the top industrial houses in India and enjoy enormous economic power. In size and resources, competitors of the OP (a part of Sun group, a prominent South Indian business house) are having no less superior position. Airtel DTH is a part of Bharti Airtel group which has vast resources having a turnover of about Rs. 42,000 crore in F.Y.2009-10. Tata Sky is part of the Tata group which is the largest business house in India and Reliance Big TV is part of Reliance ADAG Group having presence in wide ranging fields like mobile Telephony, entertainment, broadcasting, FM channels and multiplexes. The other two players – Dish TV is part of Zee- Essel group of companies and Videocon d2h is promoted by Videocon group.

12. The Commission on the basis of analysis all other factors of Section 19(4) of the Act has also found that considering the clout of other competitors, OP is not uniquely positioned in the relevant market to act independently of its competitors.

13. The Commission also observes that even in South India, it is not that other DTH service providers are having no presence. There is no entry barrier which prevents other operators from gainfully entering and operating in the market.

14. Considering all the above mentioned facts of the case, the Commission holds that OP is not in a position of dominance and there are other players in the relevant market which are providing effective competition in the market.

15. On various allegations contained in the information, the Commission observes that when OP is not in a position of dominance, question of abuse arising out of position of dominance does not arise. The Commission in this context further observes that unless OP is held dominant, the question of it indulging in predation in terms of subsidizing its services to the consumers may not be relevant as per the scheme of the Act.

16. The Commission has noted that there is nothing anti-competitive in the act of providing subsidy to the consumers in terms of Section 3 (4) of the Act as well. The agreement of OP with the consumers cannot be termed as anti-competitive within the meaning of Section 3 (4) of the Act since no barrier has been created through such an agreement for the other players to enter into the market and there is no foreclosure of competition. Further, there is nothing specific in the information to suggest how the agreement of OP with subscribers is anti-consumer. The Commission in this context has noted that the information itself suggests that the OP is providing subsidy to the consumers on Set-Top Box and monthly subscription charges for the paid channels, an act which is beneficial to the consumers and is part of business model adopted by all DTH players including the OP.

17. In this regard, the Commission has also taken cognizance of the findings of DG that alleged subsidisation towards set-top box and other hardware to the consumer is only for the purpose of viewing and ownership rights are not transferred. OP remains the owner of the hardware and retrieves it once the consumers discontinue the subscription. Further, competitors of OP are offering set-top boxes in more or less similar terms and none of them is recovering the full cost of the hardware provided to the consumers. The Commission has also noted that competition in the DTH services has driven the prices of initial offers down in the last few years benefiting the consumers and all the DTH service providers are more or less charging the same amount of money on monthly basis from their consumers. There is no harm to the competitors as well since Airtel DTH and now the latest entrant in the market , Videocon d2h has captured a significant

number of subscribers after their entry in the business over last two or three years. Thus, there is no appreciable adverse effect on competition in respect of factors given in Section 19 (3) of the Act. Therefore, there is no contravention of Section 3 of the Act in the instant case.

18. In view of the foregoing and after considering the entire material, the Commission is of the view that there is no reason to disagree with the findings of DG that there is nothing in the information which establishes violation of any provisions of the Act. The Commission, therefore, is of the view that the proceeding relating to instant information should be closed forthwith under Section 26 (6) of the Act.

19. In view of the above, the matter relating to this information is hereby closed under Section 26(6) of the Competition Act.

20. Secretary is directed to inform the parties accordingly.

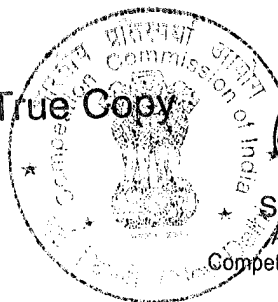
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01/09/2011
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