11.05.2018

Notice given by Bharti Airtel Limited and Bharti Hexacom Limited pursuant to an inquiry under Section 20(1) of the Competition Act, 2002

CORAM:

Mr. Devender Kumar Sikri
Chairperson

Mr. Sudhir Mital
Member

Mr. Augustine Peter
Member

Mr. U. C. Nahta
Member

Mr. G. P. Mittal
Member

Appearances during Oral hearing on 30.01.2018 for Bharti Airtel Limited and Bharti Hexacom Limited:

Mr. Amit Sibal, Sr. Advocate, Mr Atul Dua, Advocate, Mr. Sameer Chugh, Director (Legal), Bharti Airtel Limited, Mr. Ankush Walia, Advocate, Mr. Param Tandon, Advocate, Dr. Vijay Kumar Aggarwal, Advocate

Order under Section 43A of the Competition Act, 2002

A. Section 20(1) Proceedings and filing of notice

1. The Competition Commission of India ("**Commission**"), in its meeting held on 20.06.2016 took *suo motu* cognizance of transaction involving acquisition of right to use of spectrum by Bharti Airtel Limited ("**Airtel**") from Aircel Limited ("**Aircel**") pursuant to guidelines for trading of access spectrum ("**Spectrum Trading Guidelines**") issued by the Department of

Telecommunication ("**DoT**"), Government of India and accordingly decided to initiate an inquiry under Section 20(1) of the Competition Act, 2002 ("**Act**") in the above-said transaction. *Vide* letter dated 30.06.2016, Airtel was directed to provide, *inter alia*, copy(ies) of definitive agreement(s) entered between the parties to the transaction, details of assets/turnover of the parties *etc*.

2. Airtel submitted the requisite information/document(s) on 04.08.2016. The Commission considered the response filed by Airtel and noted that based on the combined assets and turnover of Airtel and Aircel Group entities, the notification thresholds under Section 5(a) of the Act are met. Further, the Commission noted that acquisition of spectrum: (i) is an "acquisition" within the meaning of the Act; and (ii) does not fall under any item under Schedule I to the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 ("**Combination Regulations**"). Accordingly, *vide* letter dated 12.04.2017, the Commission directed Airtel to file notice in Form I for the above-said transaction in terms of Section 20(1) of the Act read with Regulation 8 of the Combination Regulations ("**Section 20(1) Directions**").

3. Pursuant to the Section 20(1) Directions, on 15.05.2017, Airtel filed a notice jointly with Bharti Hexacom Limited ("**Bharti Hexacom**") (Hereinafter Airtel and Bharti Hexacom are collectively referred to as the "**Acquirers**") for acquisition of the right to use of 20 MHz spectrum in the 2300 MHz band of BWA Spectrum in each of 8 licensed services areas, namely, Andhra Pradesh, Assam, Bihar, Jammu and Kashmir, North East, Tamil Nadu, Odisha and West Bengal from Aircel, Aircel Cellular Limited ("**Aircel Cellular**") and Dishnet Wireless Limited ("**Dishnet**") (collectively "**Aircel Group**") ("**Spectrum Transaction**) (hereinafter the Acquirers and Aircel Group are collectively referred to as the "**Parties**"). For the purpose of the Spectrum Transaction, the Parties entered into eight separate Spectrum Trading Agreements each dated 08.04.2016. The right to use of the aforesaid Spectrum for 6 licensed service areas, namely, Assam, Bihar, Jammu and Kashmir, North East, Tamil Nadu and West Bengal was transferred with effect from 17.06.2016 pursuant to the approval of the DoT. The right to use of the aforesaid spectrum for Odisha

and Andhra Pradesh was transferred with effect from 30.06.2016 and 16.11.2016 respectively pursuant to the approval of DoT.

B. Approval of the Combination and Section 43A proceedings

4. The Commission, in its meeting held on 21.06.2017, approved the Spectrum Transaction by passing an order under Section 31(1) of the Act ("**Order**") without prejudice to any penalty proceedings under Section 43A of the Act. In terms of Section 43A of the Act read with Regulation 48 of the Competition Commission of India (General) Regulations, 2009 ("**General Regulations**"), a show cause notice ("**SCN**") dated 14.09.2017 was issued to the Acquirers to show cause, in writing, within 15 days of the receipt of SCN as to why penalty, in terms of Section 43A of the Act should not be imposed on them for failure to file notice for the Spectrum Transaction within the stipulated time under the provisions of the Act and consummating the Spectrum Transaction before expiry of timelines as provided in Section 6(2A) of the Act. The Acquirers filed their response to the SCN ("**Response**") on 29.09.2017 along with a request for oral hearing, in terms of Regulation 48 of the General Regulations.

5. The Commission, in its meeting held on 28.12.2017, considered the Response and granted a personal hearing to the Acquirers on 11.01.2018. However, *vide* letter dated 09.01.2018, the Acquirers requested for adjournment in the matter. The Commission accepted the request of the Acquirers and granted a personal hearing on 30.01.2018. Accordingly, the Acquirers presented their case before the Commission on 30.01.2018.

C. Submissions of the Acquirers

6. In the Response and during oral submissions, the Acquirers, *inter alia*, contended the following:

Preliminary Submissions

6.1. That the SCN issued by the Commission fails to reveal whether the procedure prescribed under Regulation 48 of the General Regulations has been followed and as to whether the

Commission has taken up the issue in any of its ordinary meeting and decided to issue a show cause notice in the matter. The SCN does not provide a copy of the order of the Commission by which the Secretary has been authorised/directed to issue the SCN. In view of the above, the SCN is incompetent and liable to be withdrawn/dropped.

6.2. That the copy of the order of the Commission for directions dated 30.06.2016 (seeking information about the transaction) was also not annexed with the letter communicating directions of the Commission. Airtel, while submitting response dated 04.08.2016 requested for a copy of the order wherein the Commission had decided to initiate an inquiry under Section 20(1) of the Act. The Commission neither provided a copy of the order nor decided the objections regarding jurisdiction and maintainability raised by Airtel.

6.3. That after receipt of Section 20(1) Directions, Airtel had filed an application under Regulation 50(1) of the General Regulations for inspection of record and that neither the inspection was granted nor a copy of the order wherein the Commission considered response of Airtel dated 04.08.2016 was provided by the Commission.

6.4. That the Commission passed the Order approving the Spectrum Transaction also without dealing with preliminary submissions made by Airtel as regards jurisdiction and maintainability.

6.5. That as the legal issues regarding jurisdiction and maintainability of the directions dated 30.06.2016 and 12.04.2017 were yet to be determined, the SCN is liable to be withdrawn/dropped by the Commission.

6.6. That the Commission in Bhartiya Mahila Bank/SBI C-2016/11/458[1] ("**SBI-BMB Case**"), did not proceed under Section 43A of the Act even though the notice in said case was also filed pursuant to an inquiry under Section 20(1) of the Act apparently for the reason that subsequently, upon filing of the mandatory notice pursuant to the directions of the

[1] Order dated 29.11.2016, passed under Section 31(1) of the Act

Commission, the Commission approved the combination. Same analogy deserves to be applied in the present matter as well and notice deserves to be withdrawn/dropped.

Submissions on Merits

6.7. That the transaction did not qualify as "acquisition of an enterprise" within the meaning of Section 5 of the Act because:

i. The transaction is undertaken in terms of Spectrum Trading Guidelines and adhered to the requirements contained therein. At all times, including even after the transfer of right to use of the aforesaid spectrum, the Acquirers continued and still continue to be within the Spectrum Caps prescribed by the DoT in Spectrum Trading Guidelines;

ii. Aircel Group did not transfer any customers or market share or part of enterprise to the Acquirers;

iii. Even after transfer of the right to use of the spectrum, Aircel Group continues to provide services to its customers and its ability to provide services to its existing and new customers does not get impacted in any manner;

iv. The transaction does not entail "acquisition" of spectrum, i.e., there is no transfer of title to the spectrum from the vendor to the vendee. The ownership of spectrum remains with the Government of India at all times and merely the right to use the spectrum has been granted to the identified licensees. The Government of India has a right to recall any of the spectrum licensed to telecom service providers ("**TSPs**"), under certain conditions, including the failure to comply with the original terms of auction and license. The Spectrum Trading Guidelines only permit downstream trading of the right to use of spectrum and the Government of India retains ownership of the spectrum and the ability to recall the right to use of

spectrum. Mere assignment of the right to use does not amount to an "acquisition" under the Act.

6.8. That the Spectrum Transaction is not required to be notified in view of exemption under Item 3 of Schedule I read with Regulation 4 of the Combination Regulations. Regulation 4 provides that transactions specified in Schedule I are ordinarily not likely to cause an AAEC in India and a notification need not normally be filed with the Commission with respect to such transactions. Item 3 of Schedule I reads,

"An acquisition of assets, referred to in sub- clause (i) or sub-clause (ii) of clause (a) of section 5 of the Act, not directly related to the business activity of the party acquiring the asset or made solely as an investment or in the ordinary course of business, not leading to control of the enterprise whose assets are being acquired except where the assets being acquired represent substantial business operations in a particular location or for a particular product or service of the enterprise, of which assets are being acquired, irrespective of whether such assets are organized as a separate legal entity or not."

6.9. That the Spectrum Transaction is exempt under Item 3 of Schedule I of the Combination Regulations because:

i. *Spectrum Transaction is in ordinary course of business*: Considering that mobile services cannot be provided without spectrum, it is self-evident that the acquisition of a right to use the spectrum (as long as approved by the DoT) by a TSP would fall within the ambit of ordinary course of business for such a TSP;

ii. *Spectrum Transaction does not lead to the acquisition of control over Aircel Group:* The transaction relates to assignment of the right to use of spectrum alone and does not result in the acquisition of control by the Acquirers over Aircel Group in any manner;

iii. *The Spectrum Transaction does not involve acquisition of assets that represent a substantial portion of Aircel Group's business operations in a particular location or for a particular product or service of Aircel Group:* The right to use of

spectrum forming part of Spectrum Transaction constitutes not more than 6 percent of Aircel Group's business by revenue in any circle. Thus, the spectrum in question did not represent a substantial portion of Aircel Group's business operations.

6.10. That the Spectrum Transaction falls within the purview of telecom regulatory regime and the concerned authority(ies) therein. The issues relating to telecom policy and the functioning of TSPs are regulated by the DoT as well as the TRAI and that the regulatory regime for telecom sector is a self-contained mechanism which addresses, *inter alia*, competition related concerns. The Spectrum Trading Guidelines prescribe an overall spectrum threshold with a view to protect and promote competition in telecom sector. Further, Spectrum Trading Guidelines facilitate efficient utilization of spectrum. Section 62 of the Act states,

"The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force"

As such, the Act contemplates that the Commission should exercise its powers to review in a harmonious manner and should refer to the provisions of legislation/regulations and/or the concerned regulator(s) for specific sectors, especially where such legislation/regulations and/or regulator(s) seek to address competition concerns.

6.11. That, alternatively, the Commission may make a reference to the DoT in terms of Section 21A of the Act, which provides for instances where the Commission may make a reference to a statutory authority. Section 21A reads,

"(1) Where in the course of a proceeding before the Commission an issue is raised by any party that any decision which, the Commission has taken during such proceeding or proposes to take, is or would be contrary to any provision of this Act whose implementation is entrusted to a statutory authority, then the Commission may make a

reference in respect of such issue to the statutory authority: Provided that the Commission, may, suo moto, make such a reference to the statutory authority.

(2) On receipt of a reference under sub-section (1), the statutory authority shall give its opinion, within sixty days of receipt of such reference, to the Commission which shall consider the opinion of the statutory authority, and thereafter give its findings recording reasons there for on the issues referred to in the said opinion. "

That considering that there are sector specific guidelines which not only provide for a procedure to be followed for spectrum trading but also ensure the protection of competition between TSPs when trading the right to use of spectrum, this is a fit case for reference by the Commission to the DoT.

6.12. That without prejudice to the above, the Commission may consider following mitigating factors/circumstances:

i. Spectrum trading is regulated by specific guidelines and these guidelines do not make the provision for filing under the Combination Regulations. Therefore, being a debatable issue, different views and interpretation are possible as to whether the transaction is covered under the provisions of Section 5 and 6 of the Act;
ii. There was no *malafide* intention to evade compliance under the provisions of the Act;
iii. It has been determined that the Combination did not cause any adverse effect on competition;
iv. The Acquirers have continued to cooperate and comply with the directions of the Commission at all stages; and
v. There have been no previous instances where the Commission has found the Acquirers to be in violation of the provisions relating to Section 5 and 6 of the Act.

D. Analysis and Findings of the Commission

7. The Acquirers have stated that the SCN fails to reveal whether the procedure contained in Regulation 48 of the General Regulations has been followed. In this regard, it would be appropriate to first consider the requirements of Regulation 48 of the General Regulations. Regulation 48 of the General Regulation reads,

*"**Procedure for imposition of penalty under the Act. –***
(1) Notwithstanding anything to the contrary contained in any regulations framed under the Act, no order or direction imposing a penalty under Chapter VI of the Act shall be made unless the person or the enterprise or a party to the proceeding, during an ordinary meeting of the Commission, has been given a show cause notice and reasonable opportunity to represent his case before the Commission.

(2) In case the Commission decides to issue show cause notice to any person or enterprise or a party to the proceedings, as the case may be, under sub- regulation (1), the Secretary shall issue a show cause notice giving not less than fifteen days asking for submission of the explanation in writing within the period stipulated in the notice.
(3) The Commission shall, on receipt of the explanation, and after oral hearing if granted, proceed to decide the matter of imposition of penalty on the facts and circumstances of the case."

8. It is observed that Regulation 48 of the General Regulation requires that no order imposing a penalty is to be made without issuing a show cause notice and granting opportunity to the concerned parties to represent their case. It further provides the following procedure to be followed before deciding on imposition of penalty –

i. In case the Commission decides to issue a show cause notice, the Secretary to issue a show cause notice to the parties concerned giving them at least 15 days' time for submission of explanation;

ii. After receipt of explanation, the Commission may grant oral hearing; and

iii. The Commission to proceed to decide the issue of imposition of penalty.

9. In the instant case, the SCN clearly mentioned that the Commission considered the matter in its meeting held on 21.06.2017 and approved the Spectrum Transaction without any prejudice to proceedings under Section 43A of the Act. In accordance with the directions of the Commission and in terms of Regulation 48 of the General Regulations, the Secretary issued the SCN and the Acquirers were given 15 days' time to respond to the SCN. Thus, the procedure contained in Regulation 48 of the General Regulations was duly followed and the contents of the SCN also reflected the same. Therefore, the submission of the Acquirers that the SCN failed to reveal whether the procedure prescribed under Regulation 48 is not correct.

10. As regards the contention that the SCN does not provide a copy of the order of the Commission by which the Secretary has been authorised/directed to issue the SCN, the SCN is self-contained and the procedure does not require provision of the order of the Commission along with the SCN. In case the parties are desirous of obtaining copies of the orders of the Commission *etc*., they may file inspection requests and obtain certified copies of the document(s) by following procedure contained in General Regulations. In the instant case, the SCN was issued on 14.09.2017, the Acquirers submitted Response on 28.09.2017 and thereafter filed inspection request on 03.01.2018 which was granted on 18.01.2018. In view of the above, the contention of the Acquirers, that SCN is incompetent, is not tenable.

11. The Acquirers have also contended that the directions dated 30.06.2016 were also issued without providing a copy of the order of the Commission and that the same was not provided even when a request was made while filing response dated 04.08.2016. In this regard, it may be noted that the General Regulations contain elaborate procedure for inspection of documents and for obtaining certified copies of the same. Airtel, while filing response dated

04.08.2016 did not make any request in terms of the provisions of General Regulations for inspection/provision of certified copies. In view of the same, the contention of the Acquirers is not tenable.

12. The Acquirers have also contended that Section 20(1) Directions were issued by the Commission without deciding on the objections regarding jurisdiction and maintainability raised by Airtel in its reply dated 04.08.2016. In this regard, the Commission observed that Section 20(1) Directions clearly recorded that the Commission considered the response dated 04.08.2016 and further noted that Airtel and Aircel Group entities met the notification thresholds prescribed under Section 5(a) of the Act. As regards the submissions of Airtel on Spectrum Transaction not requiring notice, Section 20(1) Directions recorded that (i) acquisition of spectrum is an "acquisition" within the meaning of the Act; and (ii) does not fall under Schedule I to the Combination Regulations. Thus, the Section 20(1) Directions were sufficiently reasoned as regards the basis for issuing such directions and the same also conveyed that Airtel's response filed on 04.08.2016 was duly considered by the Commission in arriving at the decision to initiate inquiry into the Spectrum Transaction. In view of the same, the Acquirer's contentions that Section 20(1) Directions were issued without deciding on the issues of jurisdiction and maintainability are not tenable.

13. As regards the issue of inspection request in respect of Section 20(1) proceedings, the same was granted and conducted by the Acquirers on 20.12.2017, *i.e.*, before the personal hearing, which was granted on 30.01.2018.

14. The Acquirers have contended that the Commission passed the Order approving the Spectrum Transaction also without dealing with preliminary submissions made by Airtel as regards jurisdiction and maintainability. As stated above, the issues of notifiability of Spectrum Transaction were already dealt at the time of issuing Section 20(1) directions. After the Acquirers had filed the notice there were two separate issues to be considered *viz*., (i) assessing the Spectrum Transaction for an appreciable adverse effect on competition; and (ii) imposition of penalty under Section 43A of the Act. The two aspects are delinked so that the approval of a transaction does not get delayed because of the penalty proceedings which

are likely to take some time. Accordingly, the Commission approved the Spectrum Transaction by passing an order under Section 31(1) of the Act without prejudice to Section 43A proceedings which were subsequently initiated.

15. The Acquirers have made a reference to SBI-BMB Case and inferred that as the Commission approved the transaction after asking the parties to file notice under Section 20(1) of the Act, and did not initiate Section 43A proceedings, the same analogy deserves to be followed in the instant case. In this regard, the Commission observed that initiation of Section 43A proceedings depend upon the facts and circumstances of each case and not merely on whether the transaction is ultimately approved or not. As such, the Acquirers' view of the same analogy to be applied in this case is based on incomplete knowledge of facts and hence, not correct.

16. The Commission has noted the submissions of the Acquirers on merits and on consideration of the aforesaid, the following issues arise for determination in the present matter:

    i. Whether the fact that the Spectrum Transaction is pursuant to Spectrum Trading Guidelines ousts the jurisdiction of the Commission?
    ii. Whether the Spectrum Transaction amounts to "acquisition of assets" within the meaning of the term under Section 5 of the Act? And
    iii. If the Spectrum Transaction amounts to "acquisition", whether the transaction is covered under Item 3 of Schedule I of the Combination Regulations?

Issue No. 1: Whether the fact that the transaction is pursuant to Spectrum Trading Guidelines ousts the jurisdiction of the Commission?

17. In this regard, it may be noted that merely the fact that the sectoral regulator allows an activity and prescribes conditions as regards the functioning of the same, it does not mean or imply that the competition law would not apply to the concerned sector. The Act requires all instances of acquisition of assets, shares, control, voting rights or instances of mergers or amalgamations to be notified to the Commission which meet the jurisdictional thresholds

prescribed under Section 5 of the Act. The Act does not contain or envisage any exemption to sectors wherein the sectoral regulator guidelines contain any provision which may relate to the competitiveness of the sector.

It may be further relevant to note that the said guidelines are in the nature of subordinate legislation and thus repugnancy, if any, is not a case of conflict between legislations enacted by the Parliament. Nevertheless, considering the situation on an overall basis, it seems appropriate to conclude that the guidelines issued by a sectoral regulator are in furtherance of the protection of market competition and not replace the assessment mandated to be carried out by the Commission. The clauses included in Spectrum Trading Guidelines primarily relate to market share of the parties in terms of spectrum holding. Market share is just one of the several factors, as contained in Section 20(4) of the Act, for assessing likelihood of a proposed combination leading to AAEC. Further, even the market shares cannot be considered in accordance with the pre-determined safe harbours as the efficacy of market shares can vary from sector to sector and even from case to case depending on other factors. Accordingly, the Commission has noted in its orders relating to telecom sector that the assessment of a proposed combination needs to be based, independently of such guidelines, on factors as contained in Section 20(4) of the Act. Thus, it may be concluded that the submissions of the Acquirer in this regard are not tenable and cannot be acceded to.

Issue No. 2: Whether the Spectrum Transaction amounts to "acquisition of assets" within the meaning of the term under Section 5 of the Act?

18. At the outset, it would be appropriate to understand the rationale behind requiring notification in the instance of acquisition of assets. The key consideration in requiring mergers and acquisitions to be reviewed is that the M&As may lead to conferring economic advantages to the parties involved giving them an ability to influence the competition dynamics of a market. The companies may get these economic benefits by acquiring shares, voting rights or control of an enterprise or by acquiring assets of an enterprise. Thus, there is no distinction between acquisition of shares, voting rights, control and acquisition of assets

in so far as it leads to economic advantages. Accordingly, acquisition of assets is required to be notified just like acquisition of shares, voting rights and control.

19. The aspect of potential economic benefits of assets is also captured in the definition of an asset as given under Indian Accounting Standard (Ind AS) 38. The Ind AS 38 defines asset as -

"... a resource: (a) controlled by an entity as a result of past events; and (b) from which future economic benefits are expected to flow to the entity."

20. However, it is also true that all assets may not have significant economic significance to merit a merger review and accordingly, all instances of acquisition of assets are not required to be notified and different jurisdictions use different approaches to distinguish between cases of acquisition of assets falling under the merger review process and otherwise. The Combination Regulations provide for two instances of acquisition of assets which do not normally require notification –

Item 3 of Schedule I –
"An acquisition of assets, referred to in sub- clause (i) or sub-clause (ii) of clause (a) of section 5 of the Act, not directly related to the business activity of the party acquiring the asset or made solely as an investment or in the ordinary course of business, not leading to control of the enterprise whose assets are being acquired except where the assets being acquired represent substantial business operations in a particular location or for a particular product or service of the enterprise, of which assets are being acquired, irrespective of whether such assets are organized as a separate legal entity or not."

Item 5 of Schedule I –
"An acquisition of stock-in-trade, raw materials, stores and spares, trade receivables and other similar current assets in the ordinary course of business."

21. Apart from the specific instances of acquisition of assets identified in Schedule I, the Commission has also considered international best practices as regards the determination of an acquisition of assets falling under the merger review process. It is observed that the international best practices are based on broad principle of considering the economic significance or competitive significance of the assets involved.

22. In this backdrop, the Commission examined the submissions of the Acquirers as regards Spectrum Transaction not amounting to acquisition of assets under the Act.

23. The first aspect to be considered in determination of instances of acquisition of assets falling under the merger review process is the economic significance. From the submissions of the Parties, it is quite clear that spectrum is a resource which is "must have" for a TSP. The Acquirers have themselves highlighted that spectrum is a basic and essential ingredient required for providing wireless telecommunication services and that every TSP must obtain the right to use spectrum from time to time with addition of subscribers to its customer base to be able to provide telecommunication services and maintain continuity of its business and services. These submissions of the Acquirers clearly bring out the fact that spectrum is integral to the operations of a TSP and therefore has significant economic and competitive significance. Also, the fact that Spectrum Trading Guidelines contain competition consideration and regulate the maximum amount of spectrum that a TSP can hold, accentuates the economic and competitive significance of the spectrum.

24. The second aspect to be considered in determination of instances of acquisition of assets falling under the merger review process is whether the concerned asset constitutes a business or whether market turnover can be attributed to it. In this regard, it may be noted that the phrase "constituting business" or "attribution of market turnover" are to be seen in context of "potential" of generating turnover and constituting business. Only in these terms, the concept of "assets constituting a business" would be in sync with the basic principle behind requiring instances of acquisition of assets to notify *i.e.*, the principle of "economic significance". Going by the view taken by the Acquirers, any enterprise would be entitled to

transfer any asset without notifying the same to the Commission if it is viewed as a surplus given the transferor's scale/scope of operations. It is clear that acquisition of spectrum increases the ability of a TSP to cater to a broader subscriber base and generate additional turnover and correspondingly reduces such abilities of a TSP that has sold the right to use of spectrum. Further, as noted above, spectrum is integral to the operations of a TSP which also highlights its economic significance. On the basis of the aforesaid economic significance of spectrum in terms of potential of generating turnover, it may be inferred that spectrum constitutes business and that market turnover can be attributed to it.

25. The Acquirers have submitted that the ownership of spectrum remains with the Government of India and that the transfer of right to use of spectrum from Government of India to licensee is revocable. The key rationale which emerges from submissions of the Acquirers in this regard is that the licensee cannot be regarded as "controlling" the spectrum held by it for use. In this regard, it is noted that spectrum is a natural resource which is critical to the provision of mobile telephony services and accordingly, the allocation and use of spectrum is regulated by government authorities and the DoT grants licenses and allocates and regulates the right to use spectrum, while retaining ownership over the resource. However, in context of competition law, as regards instances of acquisition of assets, "control" represents the right to economic benefits that would flow from the resource and not the perpetual ownership of a resource. In that context, right to use of spectrum or any other natural resource does constitute an asset. This position is buttressed by the representation of right to use of spectrum as an intangible asset by the Acquirer in its financial statements.

26. In view of the above, the Commission is of the opinion that acquisition of right to use of spectrum constitutes an acquisition of assets for the purpose of the Act.

Issue No. 3: Whether the Spectrum Transaction is covered under Item 3 of Schedule I of the Combination Regulations?

27. The essential conditions of Item 3 of Schedule I are: (i) acquisition of assets not directly related to the business activity of the acquirer; or (ii) acquisition of assets made solely as an investment or in ordinary course of business. Considering the fact that the Acquirers are also TSPs, the first essential condition cannot be fulfilled as the asset in question i.e., spectrum is directly related to the business of the Acquirers.

28. The next aspect for determination is whether the acquisition of spectrum can be considered to be in ordinary course of business or solely as an investment. In this regard, it would be appropriate to first consider what is meant by "business" and based on that to examine what constitutes activities in ordinary course of business.

29. The word "business" implies regular occupation, profession or trade. Based on this definition, the business activities can be considered as the activities relating to the regular occupation, profession or trade. After noting the scope of business activities, the next question to be examined is whether all the business activities can be said to be in ordinary course. For this purpose, the business activities/transactions need to be further classified into two broad categories, *viz.*, (i) revenue transaction; (ii) capital transactions.

30. Revenue transactions may simply be defined as those transactions which are short term and constitute income and expenditure and are accordingly reflected in profit and loss account or income statement of the enterprise. Capital transactions on the other hand are those which affect non-current items such as fixed assets, long term debt *etc*. and affect the position statement of an enterprise. In other words, capital transactions impact the ability of a business to carry out revenue transactions. For example, an installation of a new production unit (capital expenditure) would be expected to lead to increase in production which in turn would be expected to lead to greater sales revenue. On the other hand, revenue transactions only impact the existing state of operations and do not change the operating potential. Another

difference between the two may be the frequency of occurrence. Revenue transactions are frequent while capital transactions are relatively infrequent.

31. Considering the aforesaid differences between capital and revenue transactions, capital transactions are considered to be strategic *i.e.*, having economic or competitive significance and the revenue transactions are considered to be routine and usual in nature. The term "ordinary course of business" also is meant to refer to transactions which are frequent, routine and usual and therefore it may be said that the term "ordinary course of business" corresponds to revenue transactions for the competition law purposes.

32. However, it is also important to note that what constitutes revenue and capital transactions vary from business to business *i.e.*, a capital transaction for one business may be a revenue transaction for the other. For example, for a seller of plant and machinery, sale of plant and machinery may be an activity in ordinary course of business as the same constitutes its regular trade while for any player who was using a machine to produce goods for sale, sale of such machine would be a capital transaction. In fact, a same item may also have different classification. For example, furniture held for sale by a furniture seller would be a current asset and the sale proceeds of the same would be revenue receipts but for the same business, the stock of furniture held for use in office furnishings *etc.* would be a non-current asset and the expenditure incurred on purchasing the same would be capital expenditure and receipts from sale of such furniture would be a capital receipt. In other words, the activities for which business is established would be the activities in ordinary course and the activities which are meant to help the business carry on its ordinary activities efficiently would be the strategic capital transactions. In this backdrop, the specific facts of the instant case can be examined.

33. As regards the nature of activities of a TSP, it is noted that the main revenue activities of a TSP are activities relating to provision of mobile telephony services. These activities constitute the "business" of a TSP, *i.e.*, these activities are in ordinary course of business for a TSP and the activities relating to acquisition/transfer of resources such as spectrum which are used to render such services are strategic capital transactions and cannot be equated to ordinary revenue activities. The Acquirers have stated that spectrum is basic and essential to

the activities of a TSP and therefore acquisition of the same should be considered to be in ordinary course of business. It may be noted that all assets are basic and essential to the end business revenue activities and if the logic given by the Acquirers is accepted, it would imply that acquisition of any or all assets by an entity would be in ordinary course of business and eligible to get benefit of exemption under Item 3 of Schedule I of the Combination Regulations. The implication of such logic would be that none of the instances of acquisition of assets would be covered under merger review process which would be inconsistent with the provisions of the Act relating to regulation of combinations.

34. The aforesaid findings are bolstered by considering the accounting treatment of spectrum in the financial statements prepared by the Acquirers and other TSPs. While preparing the financial statements, the results of ordinary activities of a business are depicted in profit and loss account while the position of assets and liabilities is contained in balance sheet. The Acquirers have duly recognized spectrum as an intangible asset *i.e.*, a non-current asset in its balance sheet and not as asset held for sale which would have been reflected as a current asset. Thus, on one hand, representing spectrum as a non-current asset in financial statements, to make a claim that spectrum is held in ordinary course of business is not correct.

35. The Commission further observes that the aforesaid analysis is not impacted by the fact that the "trading" of spectrum has now been allowed with issuance of Spectrum Trading Guidelines and transaction was pursuant to the same. Spectrum was earlier subjected to restrictions as regards sale/transfer but there are other assets of TSPs which are equally significant to carry on the business of provision of telecommunication services and those never had such restrictions and could have been sold/transferred at their will. Going by the rationale given by the Acquirers, sale/transfer of all such assets would also be considered to be in ordinary course of business. The Spectrum Trading Guidelines allow the TSPs to sell/transfer surplus resources and promotes efficiency in operations but does not and cannot alter the nature of a transaction. Spectrum was always a non-current asset whose sale was previously not allowed and now the same has been allowed and this change does not make spectrum trading as an activity in ordinary course of business for a TSP. The conditions for

spectrum trading requiring *inter alia*, intimation to DoT before proposed effective date of trading, compliance of spectrum caps, trading permissible only after two years of acquisition of spectrum through auction, requirement of buyer to fulfil roll-out obligations in the event of acquisition of entire spectrum holding *etc.*, clearly imply that the spectrum transactions are not similar to activities in ordinary course of business which are not subjected to such conditions.

36. The Acquirers have also submitted that the spectrum acquired does not represent substantial business operations. In this regard, it may be noted that the necessary condition to avail exemption under Item 3 of Schedule I is that the acquisition of asset should be in ordinary course of business and in view of the aforesaid discussions where it is observed that spectrum transaction is not in ordinary course of business, the issue of it constituting "substantial business operations" or otherwise becomes otiose.

37. As regards the submissions of the Acquirers that the Commission should have made reference to the DoT in terms of Section 21A of the Act, it may be noted that the decision of the Commission requiring Airtel to file a notice in terms of Section 20(1) of the Act cannot be said to be contrary to any other law. The Acquirers have entered into Spectrum Transaction pursuant to Spectrum Trading Guidelines. Further, it may be noted that the decision of the Commission is not even contrary to the Spectrum Trading Guidelines due to the fact that there is no inconsistency between the Spectrum Trading Guidelines and the Act for reasons detailed above and therefore the Commission did not consider making reference under Section 21A of the Act.

38. Based on the aforesaid, it is evident that the Acquirers' act of acquiring right to use of spectrum of Aircel Group without filing a notice with the Commission amounts to contravention of provisions of Section 6(2) of the Act and accordingly attracts penalty under Section 43A of the Act, which reads as under:

"If any person or enterprise who fails to give notice to the Commission under sub section(2) of section 6, the Commission shall impose on such person or enterprise a penalty which may

extend to one percent of the total turnover or the assets, whichever is higher, of such a combination."

39. In terms of Section 43A of the Act, the Commission can levy a maximum penalty of one per cent of the combined value of the worldwide turnover of the Parties. However, the Commission has sufficient discretion to consider the conduct of the Parties and the circumstances of the case to arrive at the appropriate amount of penalty. As regards the instant case, the Commission notes that the Spectrum Transaction was amongst the first transactions of such nature and there was some uncertainty as regards coverage of the same under the Act. In view of the foregoing, the Commission considers it appropriate to impose a nominal penalty of INR 5,00,000/- (INR Five Lakhs only) on the Acquirers.

40. The Acquirers shall pay the penalty within sixty (60) days from the date of receipt of this order.

41. The Secretary is directed to communicate to the Acquirers accordingly.