11.05.2018

Notice given by Reliance Jio Infocomm 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 Reliance Jio Infocomm Limited:
Mr. Amit Sibal, Sr. Advocate, Mr P. Ram Kumar, Advocate, Ms. Dinoo Muthappa, Advocate, Mr. Dhruv Rajan, Advocate, Mr. Aditya Gupta, Advocate, Mr. R. Venkatkrisnan, General Counsel, Reliance Jio Infocomm Limited, Ms. Shelly Saluja, Senior Manager, Reliance Jio Infocomm Limited

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 Reliance Jio Infocomm Limited ("**RJIO**"/ "**Acquirer**") from Reliance Communications Limited ("**RCOM**") pursuant to guidelines for trading of access spectrum ("**Spectrum Trading Guidelines**") issued by the Department of Telecommunication ("**DoT**"), Government of India and 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, RJIO 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. RJIO submitted the requisite information/document(s) on 12.08.2016 and made certain additional voluntary submissions on 19.09.2016 and 24.11.2016. The Commission considered the response filed by RJIO and noted that based on the combined assets and turnover of RJIO and RCOM, 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 RJIO 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 07.06.2017, RJIO filed a notice for acquisition, in 800 MHz frequency band, of (i) right to use of certain spectrum; and (ii) option to acquire right to use of certain spectrum, from RCOM and Reliance Telecom Limited ("**RTL**"). For the purpose of the transaction, following agreements have been entered into by RJIO:

   i. Spectrum Trading Agreement dated 18.01.2016 with RCOM ("**Trading Agreement**") for acquisition of (i) 3.75 MHz spectrum each in telecom circles of Andhra Pradesh, Delhi, Gujarat, Maharashtra, Punjab, and West Bengal; (ii) 5 MHz spectrum each in telecom circles of Kolkata and Uttar Pradesh (West); and (iii) 1.25 MHz spectrum in Uttar Pradesh (East);
   ii. Option Agreement dated 18.01.2016 with RCOM ("**RCOM Option Agreement**") for acquisition of: […]; and
   iii. Option Agreement dated 18.01.2016 with RTL ("**RTL Option Agreement**") for acquisition of […].

(The transactions contemplated under the Trading Agreement, RCOM Option Agreement and RTL Option Agreement are together referred to as the "**Spectrum Transaction**")

4. The right to use spectrum, being subject matter of the Trading Agreement, was transferred with effect from 17.05.2016 pursuant to the approval of the DoT. On 23.05.2016, RJIO exercised its option to acquire the right to use a part of spectrum being subject matter of RCOM Option Agreement (*i.e.* 3.75 MHz in Karnataka, Kerala and Tamil Nadu and 2.50 MHz in Rajasthan). On 06.07.2016, the DoT changed the allotment of the right to use this spectrum from RCOM to RJIO.

B. Approval of the Combination and Section 43A proceedings

5. The Commission, in its meeting held on 08.08.2017, approved the Spectrum Transaction by passing an order under Section 31(1) of the Act dated 03.10.2017 ("**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 02.11.2017 was issued to RJIO 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 it 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 Acquirer filed its response to the SCN ("**Response**") on 21.11.2017 along with a request for oral hearing, in terms of Regulation 48 of the General Regulations.

6. The Commission, in its meeting held on 22.01.2018, considered the Response and granted a personal hearing to the Acquirer on 30.01.2018. Accordingly, the Acquirer presented its case before the Commission on 30.01.2018. Pursuant to the personal hearing, the Acquirer filed further written submissions on 05.02.2018 ("**Additional Submissions**").

C. Submissions of the Acquirer

7. In the Response to SCN, oral hearing and the Additional Submissions, RJIO has, *inter-alia*, made the following submissions:

Spectrum Transaction does not amount to an "acquisition"

7.1 That the intention behind requiring the notification of acquisition of assets is to ensure that acquisitions of businesses/divisions/units/portions of an enterprise, which by themselves do not constitute an "enterprise" are reviewed by the Commission when such acquisitions have an effect on the market. In this case, if RJIO acquired subscribers, suppliers, towers *etc.*, of RCOM/RTL, the acquisition of such assets as a going concern, would require notification to the Commission. The transfer of a mere right to use spectrum from one enterprise to another, however, does not envisage acquisition of assets as a going concern.

7.2 That in addition, the cases involving acquisition of intangible assets such as trademarks/intellectual property rights may merit merger control review where transfer of goodwill is also involved as the overall effect of such acquisitions would facilitate an inevitable transfer of business to the acquirer. In this case, spectrum has no goodwill or customer loyalty and therefore transfer of spectrum with no other interests of RCOM/RTL should not be considered as an asset acquisition falling under scope of Section 5 of the Act.

7.3 That the other jurisdictions also assess whether assets can constitute a business/have market facing presence or turnover for determining whether such asset acquisitions constitute a notifiable transaction for merger review. Absent any acquisition of customers, contracts, subscriptions or other essentials of a telecom business, the acquisition of spectrum would not constitute business having market presence or market turnover.

7.4 That RJIO has not acquired any ownership of assets or title to spectrum from RCOM/RTL. The Government of India continues to retain ownership of spectrum and therefore the transfer of right to use (as opposed to transfer of ownership) cannot amount to "acquisition".

A licence does not create in the licensee's favour any estate or interest in the property and is revocable at the instance of the licensor.

7.5 That spectrum has been routinely allocated through auctions conducted by the Government of India and if the Commission were to take the view that acquisition of right to use spectrum amounts to a combination under the Act, every instance of such auction of spectrum to each telecom service provider ("**TSP**") in India would amount to a notifiable combination. To the best of RJIO's knowledge, there has not been a single instance of auction that has been held to be a combination and notified to the Commission. Accordingly, if there was no requirement to file a notice under the Act at the time of allocation of spectrum through auction, the transfer of right to use between TSPs for the same spectrum would also not be required to be notified under the Act.

7.6 Based on the aforesaid, the Spectrum Transaction, does not amount to acquisition of assets under Section 5, and accordingly does not fall under the jurisdiction of the Commission.

Jurisdiction of the Commission

7.7 That without prejudice to the argument that Spectrum Transaction does not amount to an asset acquisition under the Act, the acquisition of right to use spectrum being regulated by sectoral authorities having exercised regulatory review over such acquisitions, would imply the ouster of jurisdiction of the Commission.

7.8 That the telecom sector is regulated by the DoT and Telecom Regulatory Authority of India ("**TRAI**"). The Government of India regulates the allotment and use of spectrum through its licensing and other norms. The sectoral regulator *i.e.* TRAI makes recommendations with respect to the use and allocation of spectrum to the Government of India/DoT. On 12.10.2015, the DoT issued the Spectrum Trading Guidelines to permit and regulate trading of spectrum to enable optimum use of spectrum. The TRAI along with the DoT regulates and controls the various terms of price and conditions of sale of spectrum in this sector and on various occasions intervenes by way of consultation and framing regulations and issuing clarifications from time to time. As a result of the regulatory framework, the TSPs are

subjected to regulations governing various aspects of their functioning including applying the spectrum, pricing and market share caps. Any acquisition or trading of spectrum, mergers of various TSPs are also regulated by the DoT and cannot be closed without prior approval of the DoT. The maximum quantum of spectrum holding in a particular band and across all bands for any TSP is also regulated by the DoT. The Spectrum Trading Guidelines require TSPs to ensure that their spectrum holding does not exceed: (i) a cap of 25% of all spectrum in a licensed service area; and (ii) 50% of spectrum in a particular band in a licensed service area ("**Spectrum Caps**").

7.9 That the Spectrum Trading Guidelines already contain safeguards for protection of competition by imposing restrictions on concentration of spectrum held by TSPs. That the *ex ante* competition review of spectrum acquisition (by imposing Spectrum Caps) would amount to implied exclusion of the Commission's jurisdiction.

7.10 That the allocation/buying/selling/sharing of spectrum as a result of this framework is the exclusive domain of the TRAI and the DoT. To the extent that until the Spectrum Trading and Spectrum Sharing guidelines were not introduced the TSPs could not have entered into the agreements to trade or share the spectrums at all.

7.11 That the TRAI and DoT in their wisdom and ongoing regulatory oversight have permitted TSPs to carry out trading and sharing of spectrum as long as the TSP does not breach the specified caps *i.e.* the TSPs can consummate such transfers within the specified caps without any intervention/examination on the merits of the transaction from the sector regulators. For clarity, for any round of trading and/or sharing, the TSP need to intimate the DoT by a formal communication including a cover letter, along with the details of the frequency to be traded (quantum/band), band of spectrum, circle/ LSA, price/value, details of other spectrum holding in the same band/circle. DoT takes up to 45 calendar days to take the transaction on record. This process is only limited to extent that the details of the spectrum are changed in the records of the DoT and does not entail a scrutiny of the transaction.

7.12 Based on the aforesaid, the examination of the Spectrum Transaction by the Commission results in a complete conflict *qua* spectrum between the Commission and the TRAI and the DoT.

7.13 That it concedes and submits to the jurisdiction of the Commission to inquire into and prohibit anti-competitive practices and regulate mergers and acquisitions in the telecom market (along with TRAI and DoT). However, in relation to acquisition/trading and consequent concentration or market power in spectrum holding, there would be a limited and implied ouster of the Commission's jurisdiction as the regulation and governance of this area is occupied by TRAI and DoT. In Credit Suisse Securities (USA) LLC v. Glen Billing LLC (551 U.S. 264), the US Supreme Court set out the following test to determine whether there is a conflict between the exercise of antitrust jurisdiction and sectoral regulation:

i. Existence of regulatory authority under the sectoral regime to supervise the activities in question: In India, the acquisition of spectrum is regulated by DoT in accordance with the Spectrum Trading Guidelines;

ii. Evidence that the responsible regulatory authorities exercise that authority: The acquirer of spectrum must mandatorily obtain DoT approval for transfer of allotment of spectrum;

iii. Resulting risk that sectoral and antitrust regime will, if both applicable, produce conflicting guidance and requirements: The jurisdiction of the Commission may lead to a clear conflict and incompatibility between competition law and telecom laws/regulations in India. In cases of risk of conflicting guidance, it would also be difficult for antitrust authorities to evaluate highly technical issues which fall within the purview of sector regulators; and

iv. Whether the issue involves an area falling squarely within the heartland of sectoral regulation: The Spectrum Trading Guidelines provide for *ex ante* competition review of spectrum acquisition by imposing Spectrum Caps and are aimed at utilizing under/unutilized spectrum ensuring greater competition, providing incentives for innovation *etc.* Thus, competition in spectrum acquisitions would lie squarely within activity that the Spectrum Trading Guidelines seek to regulate.

7.14 That the Spectrum Trading Guidelines set out a self-contained comprehensive framework vesting the DoT to *ex ante* regulate competition in the market for spectrum. Since the legislature has specifically made the DoT responsible to address competition in spectrum holding, it has implicitly endorsed deference to the Spectrum Trading Guidelines. Accordingly, there is an implied immunity from the Act and an exclusion of merger review jurisdiction of the Commission in the matters of spectrum trading.

Spectrum Transaction was covered under Item 3 of Schedule I of the Combination Regulations and exempt from notification

7.15 That the Commission should not have taken cognizance of the Spectrum Transaction under the provisions of the Act given the exemption granted under Schedule I, Item 3 read with Regulation 4 of the Combination Regulations.

7.16 Item 3 of Schedule I of the Combination Regulations, reads thus:

"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."

Spectrum acquired by RJIO is in ordinary course of business

7.17 That Spectrum is a basic and essential ingredient required for providing wireless telecommunication services and 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. The right to use spectrum can be acquired either from the Government which auctions this right to use

spectrum from time to time (since 2010) or from another TSP (since October 2015) when the DoT permitted and issued guidelines for trading of spectrum between TSPs.

7.18 Most TSPs have participated in all the auctions for right to use spectrum conducted by the Government of India. Further, as per media reports, 3 acquisitions of right to use spectrum through the trading route have been undertaken in the past such as the acquisition of spectrum by Bharti Airtel Limited from Aircel Limited, Telenor and Videocon Limited. Further, the acquisition of spectrum by Bharti from Aircel took place around the same time as the Spectrum Transaction and to the best of our knowledge, some of these transactions were not notified within the 30 calendar days of execution of the binding agreements. This highlights the belief of the TSPs that transactions of this nature related to spectrum form part of the "ordinary course of business" of a TSP.

7.19 That RJIO itself has acquired the right to use spectrum from time to time. It acquired right to use spectrum in the auctions conducted by the DoT in 2010, 2014, 2015 and 2016, in addition to entering into the Spectrum Transaction. If the Commission deems every such acquisition of the right to use spectrum as a notifiable transaction, then it implies that all TSPs are required to notify the Commission at the time of acquiring spectrum during each auction of spectrum by the Government of India as well.

7.20 That the Memorandum of Association of RJIO, *inter alia*, provide that mobile telephony services using spectrum to provide such services is part of RJIO's main objects.

7.21 That for the above reasons, trading of spectrum is an activity in the normal course of business for all TSPs as permitted by the DoT. The Government recognizes spectrum as an intangible asset and provides flexibility to TSPs to trade and share spectrum during the ordinary course of business.

7.22 That Courts in India have relied on factors such as historical practices of the entity, common industry practices and whether the transaction relates to the main purpose of business such

as those listed in the company's charter documents to decide on what constitutes "ordinary course of business". Considering that: (i) RJIO has participated in auctions for spectrum in 2014 and 2016; (ii) other TSPs have routinely bid for spectrum in auctions and have also traded spectrum; and (iii) the acquisition of spectrum is directly related to the provision of telecom services, the Spectrum Transaction is in ordinary course of business of RJIO.

Acquired spectrum under the Spectrum Transaction does not represent "substantial business operations" of either RCOM or RTL

7.23 The business operations of a TSP consist of numerous components including, licenses, infrastructure (cables, fiber, towers, equipment, spectrum, office space *etc.*) and contracts relating to the same, personnel and manpower *etc.* Pursuant to the Spectrum Transaction, RJIO acquired only the bare right to use certain portion of the spectrum that was available with RCOM / RTL and RJIO has not acquired any part of the business operations of RCOM or RTL. Importantly, spectrum by itself cannot provide telecom services and it is one of the many essential ingredients required for provision of telecom services. Accordingly, spectrum itself cannot amount to "business operations" of RCOM. Further, acquisition of mere spectrum cannot be said to constitute a "substantial" portion of business operations of RCOM/RTL.

7.24 Notwithstanding the above, if spectrum alone were held to amount to "business operations", the quantum of spectrum acquired would not amount to substantial business operations. The spectrum in respect of which the right to use has been transferred to RJIO represents only approx. 18% of the total spectrum holding of RCOM/RTL. Even on a circle wise basis, RJIO has not acquired spectrum which represents substantial business operations of RCOM/RTL in any circle.

7.25 That RJIO has not acquired any customers or contracts whatsoever of RCOM/RTL pursuant to the Spectrum Transaction. There is no provision whatsoever for customers of RCOM or RTL to be transferred to RJIO under the Spectrum Transaction documents. In fact, RJIO and RCOM/RTL actively compete as far as business operations are concerned. In fact, RCOM's

CDMA customers could not have been acquired by RJIO as at the time of the Spectrum Transaction closing and at the time RCOM ceased its CDMA operations, RJIO was yet to commence its telecommunications operations. The customers of RCOM/RTL continued to remain RCOM's/RTL's customers even if RCOM/RTL shared the spectrum used to service them with RJIO. Such sharing agreements are similar to roaming agreements between TSPs whereby a TSP without network in a particular area enters into an agreement with another TSP who possesses network in that area which would allow its customers to roam on the others' network in that area while remaining customers of the original service provider. Also, subsequent to the Spectrum Transaction, RCOM continued to hold spectrum in 800 MHz band in 22 circles in India and continued to service such customers. The spectrum remaining with RCOM/RTL was more than adequate to serve their customers. Thus, there was no acquisition of any portion, leave alone a substantial portion, of RCOM/RTL's business operations.

Transaction does not lead to acquisition control of RCOM or RTL (the enterprises whose assets were acquired)

7.26 That RJIO acquired no rights in either the management or affairs of RCOM or RTL, pursuant to the Spectrum Transaction. At the time of Spectrum Transaction and thereafter, RJIO and RCOM/RTL continued to operate as independent entities.

Narrow interpretation of the Item 3 exemption would make several small spectrum trading deals notifiable

7.27 The Spectrum Trading Guidelines provide for spectrum trading deals even for small volumes such as 0.2 MHz and thus, if the Commission finds that the exemption would not apply to facts of the present transaction, then all spectrum trading deals irrespective of their size would end up requiring notification to the Commission unnecessarily flooding the Commission with notifications regarding routine transactions that have no impact on competition.

Section 43A does not envisage a penalty for failure to comply with Section 6(2A)

7.28 That the omission of any reference to Section 6(2A) under Section 43A of the Act must be interpreted to imply that there is no specific, explicit or express provision for penalty provision for violation of Section 6(2A) of the Act.

7.29 That the legislature, in its wisdom, did not intend to impose a penalty once Section 6(2) was complied with. Instead, the protection offered by the Act to violations of Section 6(2A) where parties consummate the combination, is that combinations causing or likely to cause AAEC may be held as void and unscrambled by the Commission, under Section 6(1) read with Section 31(2) of the Act. The purpose of Section 6(2)(a) is to ensure that a notification is made for the scrutiny of the Commission – where non-compliance with Section 6(2)(a) occurs, penalty under Section 43A may be imposed. However, once a notice has been filed and Section 6(2)(a) is complied with, the penalty provision under Section 43A cannot be invoked to cover violations of Section 6(2A) of the Act. Importantly, penalizing provision *i.e.* Section 43A of the Act was brought under the Competition (Amendment) Act, 2007, which also introduced the standstill obligations under Section 6(2A). The deliberate omission of an explicit and specific reference to Section 6(2A) under Section 43A of the Act implies the specific exclusion of the Commission's powers to impose penalties for violations of Section 6(2A) of the Act.

Mitigating factors

7.30 That without prejudice to the above, in the event the Commission were to find RJIO in violation of the Act, the Spectrum Transaction is a fit case for no imposition of penalty considering, *inter alia*:

i. *Uncertain question of law:* Spectrum trading was introduced in India only in 2015 and the Spectrum Transaction was one of the first instances of spectrum trading in India. Unlike other cases of acquisition of intangible assets on a stand-alone

basis notified to the Commission, there is no acquisition of ownership of assets or transfer of any business presence in this case. Accordingly, there was significant uncertainty as regards notification requirement under the Act (and RJIO had obtained due and adequate legal advice in this regard). That the present proceedings involve a novel question of law. Given further uncertainty as to whether right to use of spectrum would qualify for exemption under Item 3 of Schedule I, the Commission may take a lenient view;

ii. *No mala fide intention to evade law:* That the failure to notify was unintentional as RJIO was under the bona fide belief that the Spectrum Transaction was not notifiable. RJIO obtained legal advice from two retired Hon'ble Judges of the Supreme Court of India prior to consummation of the Spectrum Transaction. Both the Hon'ble Judges were of the view that the Spectrum Transaction is covered under Item 3 of Schedule I and is exempt;

iii. *Spectrum Transaction would not be notifiable under applicable merger control today:* If the Spectrum Transaction were to take place today, the value of turnover derived from RCOM's ideal spectrum would be *de-minimis i.e.*, no revenue can be ascribed to the acquired spectrum as it represents a surplus and unutilized asset for RCOM/RTL;

iv. *No deterrent effect required in this case:* That given the change in regulatory position, uncertainty of law, lack of mala fides, there is no requirement for deterrent effect;

v. *No previous violation of the Act by RJIO:* Reliance Industries Limited, the parent of RJIO has a comprehensive competition compliance policy in place and endeavours to be in compliance with the Competition Act at all times. Therefore, penalizing RJIO for a delay in filing the notice would be unfair and excessive. Any penalty would cause severe damage to RJIO's reputation, which as a new entrant to the market has brought huge pro-competitive benefits to the telecom sector and the consumers;

vi. The parties did not try to conceal the arrangement. On the contrary, they notified the Spectrum Transaction to the DoT and the details of the same were available in the public forums;

vii. The transaction did not raise competition issues in India. The Commission's unconditional approval, of course, is not a defence to a filing requirement. But it is further evidence that any failure to notify this innocuous Spectrum Transaction was inadvertent and without mala fides and that punitive fines should be reserved for companies who try to shield transactions from competition scrutiny, to the potential detriment of consumers and the market;

viii. That RJIO actively cooperated with the Commission throughout this proceeding. In response to the Commission's letter of 30.06.2016 asking why it did not file the transaction, RJIO provided a full explanation by letter dated 11.08.2016. Upon learning that the Commission continued to have questions or concerns and further to the letter dated 12.04.2017, RJIO notified the transaction in a Form I on 07.06.2017 in a spirit of cooperation and to provide the underlying facts showing the absence of any competition concerns; and

ix. That the Ministry of Corporate Affairs has also notified a significant amendment on 29.06.2017 regarding the time-period within which a transaction is to be notified to the Commission and the parties to a combination are now exempt from filing a notification within 30 days of the execution of the relevant trigger document the Commission. Accordingly, no penalty be levied on RJIO given the change in the regulatory framework.

Submissions on principle of natural justice

7.31 That the Commission, without hearing it, passed the non-speaking order dated 12.04.2017 and directed RJIO to file a Form I notice in relation to the Spectrum Transaction. RJIO was not granted a hearing to confirm whether the Spectrum Transaction is covered under Schedule I, Item 3 of the Combination Regulations or not and that this is in violation of the settled principles of natural justice and subjected RJIO to a regulatory requirement that was clearly inapplicable.

D. Analysis and Findings of the Commission

8. The Commission has noted the submissions of the Acquirer 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?

9. As regards the submissions of the Acquirer regarding regulation of telecom sector by TRAI and DoT and that the examination of the Spectrum Transaction by the Commission results in a complete conflict *qua* spectrum between the Commission and the TRAI and DoT, it may be noted that the guidelines for transfer/merger of service licences on compromises, arrangement and amalgamation of companies, issued by Ministry of Communications and Information Technology, Government of India in 2014 ("**DoT Merger Guidelines**") prescribe certain caps on market shares and spectrum holdings. As per the DoT Merger Guidelines, in case of merger or acquisition or amalgamation proposals that result in market share in any service area exceeding 50 percent, the resultant entity should reduce its market shares to 50 percent within a period of one year from the date of approval of merger or acquisition or amalgamation ("**Market Share Caps**"). As regards holding of spectrum by a TSP, the Commission noted that the spectrum holding in a licensed service area is subject to Spectrum Caps as stated above.

10. 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 of the parties 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. Further, the Acquirer has contradicted itself by stating that it concedes to the jurisdiction of the Commission as regards the mergers and acquisitions and anti-competitive practices. Considering that the DoT has issued DoT Merger Guidelines and prescribed Market Share Caps, going by the logic given by the Acquirer, even the M&As involving TSPs would be outside the ambit of competition law.

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

11. At the outset, it would be appropriate to understand the rationale behind requiring notification of instances 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.

12. 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."

13. 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."

14. 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.

15. In this regard, it is observed that the Acquirer has also submitted that the intention behind requiring the mandatory notification of asset acquisitions is to ensure that acquisitions of businesses/divisions/units/portions of an enterprise, which by themselves do not constitute an "enterprise" are reviewed by the Commission when such acquisitions have an effect on the market. The submissions of the Acquirer also indicate that the economic significance or competitive significance is the primary consideration behind requiring asset acquisitions to be notified for merger review purposes.

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

17. 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 Acquirer has itself 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 Acquirer 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.

18. 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. The Acquirer has submitted that the spectrum in the instant case does not constitute market presence as the Spectrum Transaction: (i) does not envisage acquisition of assets as a going concern; (ii) does not envisage transfer of goodwill/customer loyalty; and (iii) does not involve any acquisition of customers, contracts, subscriptions or other essentials of a telecom business. 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 Acquirer, 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. The requirements indicated by the Acquirer for an asset to be considered as constituting business may add to the economic significance of concerned asset but their absence does not diminish the economic significance of the asset on a standalone basis. 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.

19. The Acquirer has 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 RJIO 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.

20. As regards the submissions of the Acquirer that if the Commission were to take the view that acquisition of right to use spectrum amounts to a combination under the Act, every instance of such auction of spectrum to each TSP in India would amount to a notifiable combination, the Commission observed that there is fundamental distinction between acquiring spectrum by participating in auctions and acquiring spectrum from other TSPs. While acquisition of spectrum by participating in auctions amounts to organic growth, the acquisition of spectrum from other TSPs amounts to inorganic growth. The merger review processes focus on examination of inorganic growth only and consequently the acquisition of spectrum by participating in auctions would not attract scrutiny under the merger review process.

21. 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?

22. 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 RJIO is also a TSP, the first essential condition cannot be fulfilled as the asset in question *i.e.*, spectrum is directly related to the business of the Acquirer.

23. 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.

24. 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.

25. 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.

26. 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.

27. 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.

28. 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 Acquirer has 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 Acquirer 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.

29. The aforesaid findings are bolstered by considering the accounting treatment of spectrum in the financial statements prepared by the Acquirer 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 Acquirer has 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.

30. 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 Acquirer, 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.

31. The Acquirer has 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.

32. RJIO has stated that narrow interpretation of the Item 3 exemption would make several small spectrum trading deals notifiable and the same would unnecessarily flood the Commission with notifications regarding routine transactions that have no impact on competition. It has already been stated that spectrum is an asset having significant economic/competitive significance and in view of the same, the submissions of RJIO in this regard are not considered as tenable.

33. Apart from the aforesaid key issues, RJIO has made certain submissions on scope of Section 43A of the Act, mitigating factors *etc.* The same have been examined as under.

34. The Acquirer has submitted that Section 43A only provides for imposition of penalty for violations of Section 6(2)(a) and not for violation of Section 6(2A) of the Act. It has been further stated that where the parties have filed a notice under Section 6(2)(a) of the Act and have submitted to the jurisdiction of the Commission, then a penalty cannot be levied under Section 43A of the Act for violation of Section 6(2A) of the Act.

35. In this regard, at the outset, it may be noted that in terms of extant Section 6(2) of the Act, the notice should have been filed within 30 days of execution of agreement for acquisition of spectrum. In the instant case, the notice has been filed on the directions of the Commission under Section 20(1) of the Act and at that time the period of 30 days as prescribed under extant Section 6(2) of the Act had already expired and the transaction was already consummated thus implying that RJIO was already in contravention of provisions of Section 6(2) of the Act at the time of issue of Section 20(1) Directions. The same fact cannot change by reason of RJIO filing a notice pursuant to Section 20(1) Directions. Thus, considering that RJIO is found to be in violation of Section 6(2) and 6(2A) of the Act, the submissions that Section 43A only provides for imposition of penalty for violations of Section 6(2)(a) and not for violation of Section 6(2A) of the Act are not considered as relevant.

36. Notwithstanding the aforesaid findings, for the sake of completion, it may be noted that the issue of imposition of penalty for violation of provisions of Section 6(2A) has been examined and settled by the Commission in its earlier decisions in Baxalta Incorporated C-2015-07-297 (Order dated 08.03.2016) wherein it has been observed that,

"...the words "proposes" and "proposed" used in sub-section (2) of Section 6 have to be read in the context of sub-section (2A) of Section 6 (which suspends the consummation of the proposed combination for the period stated therein). Accordingly, till the expiry of the 210 days from the date of filing of the notice or the Commission has passed an order under Section 31 of the Act, whichever is earlier, a combination should remain a proposed combination and parties to the combination should not give effect to the combination. ***If the parties to the combination are allowed to give effect to the proposed combination either before filing of the notice with the Commission or after filing of the notice but before the expiry of the period given in sub-section (2A) of Section 6 of the Act, then it will tantamount to violation of sub-section (2) of Section 6 of the Act****."* (emphasis added)

37. Further, the erstwhile Hon'ble Competition Appellate Tribunal ("**CompAT**"), while adjudicating the issue relating to *ex-ante* nature of notification in the case of SCM Soilfert

Limited and Others v. Competition Commission of India, (2016) Comp. L.R. 1111 ("**SCM Case**"), observed that:

"The ex-ante nature of notification under Section 6(2) is buttressed by a reading of sec. 6(2A) which deliberately used the phrase "no combination shall come into effect" until 210 days from date of notice, or passing of order under Sec. 31."

38. The principles enshrined in Baxalta Incorporated and SCM Case have been applied by the Commission in certain other cases as well. In view of the aforesaid, the submissions of RJIO are not considered as tenable.

39. The Commission noted the submissions of RJIO that if the Spectrum Transaction were to take place today, the value of turnover derived from RCOM's ideal spectrum would be *de-minimis i.e.*, no revenue can be ascribed to the acquired spectrum as it represents a surplus and unutilized asset for RCOM/RTL. The Commission observed that as the aforesaid issue is not a subject matter of the present proceedings, any determinative findings in this regard are not required and the same may be left open at this stage.

40. The Commission also noted the submissions of RJIO that the parties to a combination are now exempt from filing a notification within 30 days of the execution of the relevant trigger document the Commission. Accordingly, no penalty be levied on RJIO given the change in the regulatory framework. The aforesaid submissions of RJIO are not considered as tenable considering that (i) the regulatory framework applicable at the time of Spectrum Transaction required RJIO to file notice within 30 days of execution of agreements for acquisition of spectrum; and (ii) the Spectrum Transaction has not been notified voluntarily by RJIO but only on the directions of the Commission; and (iii) even the present regulatory framework requires the parties to a combination to file a notice before consummation of a transaction whereas the Spectrum Transaction was consummated before filing of notice.

41. The Commission noted the submissions of RJIO as regards violation of settled principles of natural justice by passing a non-speaking order requiring RJIO to file a notice and not

granting RJIO an opportunity for personal hearing. The Commission observed that Section 20(1) Directions were based on considering submissions of RJIO dated 12.08.2016 and additional voluntary submissions dated 19.09.2016 and 24.11.2016. Section 20(1) Directions were properly reasoned as regards why the Spectrum Transaction required notification with the Commission. Section 20(1) Directions clearly stated that based on the combined assets and turnover of RJIO and RCOM, the notification thresholds under Section 5(a) of the Act are met and 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 Combination Regulations. Considering the facts and circumstances of the case and given that RJIO had filed all the information and even made additional submissions, personal hearing was not considered required at that stage. In course of Section 43A proceedings, RJIO was granted personal hearing in accordance with the General Regulations. Thus, there is no violation of natural justice and submissions of RJIO in this regard are not considered as tenable.

42. Based on the aforesaid, it is evident that the Acquirers' act of acquiring right to use of spectrum of RCOM/RTL 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."

43. 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 one of the first instances of spectrum trading in India and there was significant uncertainty as regards notification requirement 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 Acquirer.

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

45. The Secretary is directed to communicate to RJIO accordingly.