



COMPETITION COMMISSION OF INDIA

Case No. 04 of 2015

In Re

M/s Best IT World (India) Private Limited (iBall)

87, Mistry Industrial Complex, Andheri East, Mumbai

Informant

And

M/s Telefonaktiebolaget L M Ericsson (Publ)

SE-164 83 Stockholm, Sweden

Opposite Party No. 1

M/s Ericsson India Private Limited

DLF Cybercity, Sector 25-A, Gurgaon, Haryana

Opposite Party No. 2

CORAM

**Mr. Ashok Chawla
Chairperson**

**Mr. S. L. Bunker
Member**

**Mr. Sudhir Mital
Member**

**Mr. Augustine Peter
Member**

**Mr. M. S. Sahoo
Member**



Appearances: Shri Amit Sibal, Senior Advocate; Shri Dev Robinson, Shri Naval Satarawala Chopra, Ms. Manika Brar, Shri Jogeshwar Mishra, Shri Aman Singh Sethi, Shri Joyjayanti Chatterjee, Shri Tahir Siddiqui, Shri Namit Suri, Advocates and Shri Sunil B. Kedia on behalf of Informant.

Order under Section 26(1) of the Competition Act, 2002

1. The present information has been filed by M/s Best IT World (India) Private Limited (hereinafter, the '**Informant**') under section 19(1)(a) of the Competition Act, 2002 (hereinafter, the '**Act**') against M/s Telefonaktiebolaget L M Ericsson (Publ) (hereinafter, the '**Opposite Party No. 1**') and M/s Ericsson India Private Limited (hereinafter, the '**Opposite Party No. 2**') [collectively hereinafter, the '**Opposite Parties**'/ '**Ericsson**'] alleging, *inter alia*, contravention of the provisions of the section 4 of the Act in the matter.
2. The Informant is stated to be an Indian IT & Electronics company incorporated under the Companies Act, 1956 and is engaged in the business of import and distribution of computer peripherals, mobile handsets, tablets *etc.* The Informant started its business operations as a computer accessories supplier in 2001 under the brand name 'iBall' and entered into the mobile phone market in November 2010 and currently provides a wide assortment of mobile phones. The Opposite Party No. 1 is a company incorporated under the laws of Sweden and it offers services, software and infrastructure in 'Information and Communication Technology' for telecom operators and other industries including licensing of intellectual property ('IP') as well as networking equipments, mobile and fixed broadband, operations and business support solutions, cable TV, internet protocol television, video systems *etc.* The Opposite Party No. 2 is a 100% subsidiary of the Opposite Party No. 1 and is engaged in the business of manufacturing and sale of telecom equipment, network equipment, software and other services in India.



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3. As per the Informant, the Opposite Party No. 1 is one of the world's largest telecommunication companies with a global market share of 38% and also one of the largest holders of Standard Essential Patents ('SEPs') in the mobile phone and wireless industries with approximately 33,000 granted patents as of 2012, out of which 400 were granted in India.

4. It is submitted that in November 2011 Ericsson issued a letter to the Informant, stating that they have reviewed the Informant's product portfolio and it believes that patents of Ericsson have been infringed, which were directly relevant to the Informant's past, present and future GSM (Global System for Mobile Communications) and/ or WCDMA (Wideband Code Division Multiple Access) compliant products and requested for a meeting to discuss the issue. However, Ericsson did not specify any patents which were directly relevant to the Informant's products that were infringed. During the meeting, it was communicated to the Informant that some of its handset models were violating the patents of Ericsson and the Informant should enter into a global patent licensing arrangement ('GPLA') for all the patents of Ericsson. The Informant expressed its willingness to enter into GPLA if Ericsson could identify the patents which were alleged to have been infringed, such patents were valid and enforceable in India and the terms of such arrangement were reasonable and not onerous. Ericsson informed the Informant that a non-disclosure agreement ('NDA') would have to be entered into before proceeding further in the matter. The Informant has stated that Ericsson refused to share any information about the patent infringements until it executes the NDA.

5. It is submitted that an email was sent by Ericsson to the Informant on 29.11.2011 along with a draft NDA for further discussion. As per the Informant, Ericsson, through NDA, imposed very strict terms such as ten years confidentiality in relation to disclosure of any information by either party, confidential information is to be shared only with an affiliated company and all disputes are to be settled by way of arbitration in Stockholm, Sweden. The Informant had raised several concerns regarding the above said terms and conditions of the NDA and further



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highlighted that it is willing to enter into a license agreement with Ericsson as per FRAND (fair, reasonable, and non-discriminatory) terms and within the jurisdiction of Indian courts. In July 2012, it was communicated to the Informant by Ericsson that the proposed license would cover not only its future sales but also previous sales. The Informant has alleged that despite repeated requests for adopting lenient terms and conditions in the NDA and to provide details about alleged patent violations on the part of the Informant, Ericsson did not address these issues.

6. The Informant has highlighted that refusal by Ericsson to identify the standard essential patents so infringed by the Informant; threat of patent infringement proceedings; coaxing the Informant to enter into one sided and onerous NDA; tying and bundling of patents irrelevant to the Informant's products by way of GPLA; demanding unreasonably high royalties by way of a certain percentage value of handset as opposed to the cost of actual patent technology used *etc.* are violative of the provisions of section 4 of the Act. It has been alleged that the conduct of the Opposite Parties is in contravention of the provisions of section 4 of the Act. Accordingly, the Informant has prayed before the Commission to conduct, *inter alia*, necessary investigation on the abuse of dominant position by the Opposite Parties.
7. The Commission considered all the material available on record and heard the arguments advanced by the advocates appearing on behalf of the Informant.
8. The Commission observes that Ericsson is a member of a Standard Setting Organisation namely, European Telecommunications Standards Institute ('ETSI'), a non-profit organization with more than 700 member organizations spread across 62 countries from 5 continents and is officially recognized by the European Union as a European Standards Organization. ETSI produces globally applicable standards for Information and Communication Technologies *i.e.*, fixed, mobile, radio, converged, broadcast and internet technologies, some of which are covered by patents held by ETSI or ETSI members like Ericsson.



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is a voluntary process wherein a number of market players reach a consensus for setting 'common technology standards' under the support of a Standard Setting Organisation, which in the present case is ETSI. In simple terms, standardisation is the process of developing and implementing technical standards. Such technological standards are termed as SEP. Once a patent is declared as SEP, it faces no competition from other patents until that patent becomes obsolete due to new technology/ inventions.

9. As per clause 6 of ETSI IPR policy, an IPR owner is required to give irrevocable written undertaking that it is prepared to grant irrevocable licences on FRAND terms to be applied fairly and uniformly to similarly placed players. The patent owner has to grant irrevocable license to: manufacture, including the right to make or have made customized components and sub-systems to the licensee's own design for use in manufacture; sell, lease, or otherwise dispose of equipment so manufactured; repair, use, or operate equipment; and use methods.
10. FRAND license are primarily intended to prevent Patent Hold-up and Royalty Stacking. The usefulness of complex products and services often depends on the interoperability of components and products of different firms. To enhance the value of these complex products, competing manufacturers, customers and suppliers participate in standard-setting practices to set technological standards for use in designing products or services. When such standard technologies are protected by patent rights, there is a possibility for 'hold-up' by the patent owner which means a demand for higher royalties or more costly or burdensome licensing terms than could have been obtained before the patent was so declared as a SEP. Hold-up can undermine the competitive process of choosing among technologies and undermine the integrity of standard-setting activities. Ultimately, the high costs of such patents get transferred to the final consumers. Similarly, royalty-stacking occurs when a single product uses many patents of same or different licensors. As such, from the perspective of a firm manufacturing the product, all the different claims for royalties need to be added or 'stacked' together to determine the total burden of royalty to be borne by the manufacturer.



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11. It is noted that Ericsson has declared to ETSI that it has patents over 2G, 3G and EDGE technology and these patents are SEPs. As per its undertakings, Ericsson is required to offer and conclude licenses with patent seekers on FRAND terms. Ericsson's patents have also been accepted by Department of Telecommunication, India ('DoT') and every telecom service provider in India is required to enter into a Unified Access Service License Agreement with DoT. As per letter dated 03.10.2008, DoT has directed that all GSM/ CDMA network equipments imported into India should also meet the standards of international telecommunication technology as set by International Telecommunication Union, Telecommunication Engineering Center and International Standardization bodies such as 3GPP, 3GPP-2, ETSI, IETF, ANSI, EIA, TIA, IS.
12. In view of the foregoing, the Commission is of the view that SEPs owned by Ericsson are in respect of the 2G, 3G and 4G patents used in smart phones, tablets *etc.*, which fall under GSM technology therefore, *prima facie*, the relevant product market to be considered in the instant case appears to be the market of "Standard Essential Patents for 2G, 3G and 4G technologies in GSM standard compliant mobile communication devices". Considering the nature of the relevant product and pan India presence of Ericsson, the relevant geographic market in this case appears to be the territory of India. Accordingly, the relevant market to be considered in the instant case has to be the market of "Standard Essential Patents for 2G, 3G and 4G technologies in GSM standard compliant mobile communication devices in India".
13. From the perusal of the Information and the documents filed by the Informant it is apparent that Ericsson has 33,000 patents to its credit, with 400 of these patents granted in India. Ericsson is also the largest holder of SEPs used in mobile communications like 2G, 3G and 4G patents used for smart phones, tablets *etc.* Further, since there is no other alternate technology available in the market in India, Ericsson enjoys a complete dominance over its present and prospective licensees in the relevant market. Thus Ericsson, *prima facie*, appears to be dominant in the relevant market.



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14. The allegations made in the information concerning royalty rates make it clear that the practices adopted by Ericsson appear to be discriminatory as well as contrary to FRAND terms. The royalty rate being charged by Ericsson has no linkage to the functionality of the patented product rather it has linkage to the final price of the manufactured product in which the patent is being used. Ericsson seems to be acting contrary to the FRAND terms by imposing royalties linked with the cost of manufacturing product. Charging of two different license fees per phone for use of the same technology, *prima facie*, appears to be discriminatory. Further, the terms of the NDA is contrary to the spirit of applying FRAND terms fairly and uniformly to similarly placed players. The Commission observes that forcing a party to execute NDA and imposing excessive and unfair royalty rates, *prima facie*, amount to abuse of dominance in violation of section 4 of the Act. Also, imposing a jurisdiction clause debarring the Informant from getting the disputes adjudicated in the country where both the parties are engaged in doing business and vesting the jurisdiction in a foreign land, *prima facie*, appears to be unfair.
15. Moreover, the allegations brought forward by the Informant are similar to the previous cases *i.e.*, Case No. 50 of 2013 [*Micromax Informatics Limited V. Telefonaktiebolaget LM Ericsson (Publ)*] and Case No. 76 of 2013 [*Intex Technologies (India) Limited V. Telefonaktiebolaget LM Ericsson (Publ)*] wherein the Commission was of the *prima facie* view that the conduct of Ericsson amounts to violation of the provisions of section 4 of the Act and had directed the Director General ('**DG**') to conduct an investigation.
16. In the light of the above analysis, the Commission finds that a *prima facie* case of contravention of the provisions of section 4 of the Act is made out against the Opposite Parties and it is a fit case to be investigated by the **DG**. Accordingly, the Commission directs the DG to cause an investigation into the matter and to complete the investigation within a period of 60 days from receipt of this order.



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17. The Commission, however, makes it clear that nothing stated herein shall tantamount to an expression of opinion on the merits of the case and the DG shall conduct the investigation without being influenced by any observation made herein. In case the DG finds the conduct of the Opposite Parties in violation of the Act, the DG shall also investigate the role of the persons who were responsible for the conduct of the Opposite Parties so as to fix the responsibility of such persons under section 48 of the Act.

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

Sd/-

(Ashok Chawla)
Chairperson

Sd/-

(S. L. Bunker)
Member

Sd/-

(Sudhir Mital)
Member

Sd/-

(Augustine Peter)
Member

Sd/-

(M. S. Sahoo)
Member

New Delhi

Dated: 12.05.2015