

Before the
Competition Commission of India
[Case No: 24/2011]

Date of Decision:19.03.2013

Informant:

Shri Sonam Sharma

Represented by:

Self

Opposite Parties (OPs):

- Apple Inc. USA (OP1)
- Apple India Pvt. Limited (OP2)
- Vodafone Essar Limited (OP3)
- Bharat Airtel Limited (OP4)

Represented by:

ORDER

The instant information filed on 30.05.2011 under section 19(1)(a) of the Competition Act 2007 (Act), having been taken on record by the Commission relates to allegations of anti-competitive agreements entered into by the OPs as also abuse of dominant position by them, in violation of various provisions of the Act.

Information

1. As submitted by the Informant, OP1 is an American multinational corporation that designs and markets consumer electronics, computer software and personal computers, best known for hardware products like Macintosh line of computers, iPod, iPhone and iPad. OP2 is the Indian subsidiary of OP1 through which it markets its products in India. OP3 and OP4 are leading mobile service providers in India, jointly having more than 30 crore Indian subscribers that account for almost 52% market share in the GSM market.
2. The Informant has categorically claimed that the information is in regard to a particular variant of iPhone – iPhone 3G/3GS, manufactured by OP1. It has been submitted by the Informant that iPhone is a line of internet and

multimedia enabled smart phone that functions as video camera, camera phone, portable media player, internet client with email and web-browsing facilities and is capable of sending texts and receiving voicemail. Further, more than 350,000 approved third-party as well as Apple application software, having diverse functionalities including games, reference, GPS navigation, social networking, security and advertising for television shows, films and celebrities, can be downloaded from the 'App Store' to the iPhone. The Informant has claimed that during the fiscal 2010, worldwide sale of iPhone was 73.5 million. The Informant has further averred, on account of its unique features, iPhones cannot be substituted by any other smartphones available in the market.

3. According to the Informant, OP1 and OP2 entered into some secret exclusive contracts / agreements with OP3 and OP4 for sale of iPhone in India, even prior to its launch; as a result of which OP3 and OP4 got exclusive selling rights for undisclosed number of years. The iPhones sold by OP3 and OP4 were compulsorily locked, thereby meaning that the handset purchased from either of them shall work only on their respective networks and none other.
4. The Informant has further averred that OP3, in order to maximize its profit, tweaked its internet services in such a manner that they were no longer usable on iPhones and introduced iPhone-specific plans. Furthermore, the iPhone-specific internet plans of OP3 and OP4 were costly than their normal internet plans, thus compelling not only existing customers to pay extra for using internet on their iPhone but also prospective iPhone purchasers to leave their respective network providers and to compulsorily opt for expensive mobile telephony services.
5. It has also been submitted that OP1 and OP2 permit iPhone users only those applications on their iPhones that have been approved by them and available through their own online application store namely 'App Store'. If a purchaser of iPhone unlocks it to use the network service of other cellular service provider, or '*jailbreaks*' it to use any unapproved third party applications, the purchaser loses all warranties on the handset. Further, no other third party applications can be run on iPhone unless the same has been approved by Apple. If, however, operating system of jailbroken iPhone is upgraded, the iPhone gets re-locked and all third party applications are deleted by the servers of OP1 and OP2 permanently. Informant has further alleged that OP 3 & 4 refuse to accept any iPhone for repairs at their authorized service centers if the same is not purchased from them.

Allegation

6. For the purposes of allegation pertaining to abuse of dominance (AoD), the Informant has claimed that OP1 enjoys a dominant position in the relevant market for the smartphones both in India as well as internationally, iPhone being largest selling smartphone in the world. The Informant has also averred

that OP3 and OP4 jointly enjoy dominant position in the relevant market for GSM mobile telephony services in India, as they have almost 52% market share therein.

7. The Informant has submitted that OP3 and OP4 have abused their dominant position by imposing unfair conditions on the purchasers of Apple iPhones by offering expensive subscription services and compulsorily locking the handsets to their respective networks and by threatening to void the warranty terms of such iPhones that have been unlocked and/or jailbroken by the users in order to use the same on the networks of their GSM competitors or to use unapproved third party applications on their iPhones. Also, OP3 and OP4 have used their dominant position in the GSM market to enter and control the iPhone market in India.
8. It has further been submitted that OP1 and OP2 have also abused their dominant position by imposing discriminatory conditions on such persons who have purchased their Apple iPhones from a source other than OP3 and OP4 by:
 - (i) refusal to accept the said handsets for repair in its authorized service centers;
 - (ii) refusal to allow access to Apple's App Store for the purchase and download of new applications to such iPhone users;
 - (iii) by denying to such users the latest upgraded operating software;
 - (iv) compulsorily relocking and disabling such handsets and permanently deleting all unapproved third party applications installed on such handsets whenever such users try to upgrade the operating software on their handsets; and
 - (v) limiting/restricting the relevant Market of iPhones as well as iPhone Applications in India.
9. On the basis of above alleged contraventions, the Informant has suggested violation of Section 4(2)(a), (b), (c), (d) & (e) of the Act by the OPs. The Informant has also suggested violation of Section (3) of the Act by the OPs in as much as they have entered into anti-competitive agreement to limit and/or control the market for iPhone in India by creating entry barriers for other GSM players in India, thus having appreciable adverse effect on competition in the relevant market.

Prima facie view of the Commission

10. The matter was considered in several meetings of the Commission. On the basis of written as well as oral submission by the Informant and information

available in the public domain, the Commission was of prima facie view that there existed a case for DG to investigate in the matter and accordingly, vide its Order dated 30.08.2011, directed the Director General to cause an investigation under Section 26 (1) of the Act and submit a report thereon.

DG Investigation Report

11. Given the nature of allegations as highlighted by the Informant, DG has identified following concerns in the present case to carry forward the investigation:

- Did Apple enter into an exclusive arrangement with any cellular service provider for sale of its iPhone? If yes, did the practice have any adverse effect on business of other cellular service providers or limit the supply of iPhones?
- Were iPhones sold during 2008-2010 locked to the network of cellular service provider through which they were sold? Did the practice amount to tie-in arrangement between Apple and cellular service providers?
- Were iPhone users required to use only specific data plans? If yes, how these plans compared with other plans at that point of time? Did the practice amount to tying users of apple iPhone to the cellular service provider? Did it result in Appreciable Adverse effect on competition in the cellular service market in India?
- Were there conditions stipulated by Apple for development and downloading of applications on iPhones? If yes, did the practice lead to any appreciable adverse effect on competition?
- Was Apple India, Apple US dominant in the defined relevant market? If yes, did their conduct / practice amount to abuse of dominance in the relevant market?
- Were Airtel and Vodafone dominant in the defined relevant market? If yes did their conduct / practices amount to abuse of dominance in the relevant market?
- What are the best international practices and developments in the other jurisdictions?

Within the contours of above-mentioned issues, DG investigated the case. Important finding as detailed in the Investigation Report are summarized in following paragraphs.

Preliminary Objections

12. DG has submitted that during the course of investigation, some of the opposite parties have raised certain issues in the nature of preliminary objections, which are as follows:

Objections raised by AIRTEL

- i. The prima facie order fails to consider that any dispute in relation to a telecommunication service is actionable under Telecom Regulatory Authority of India Act, 1997 and the Competition Act, 2002 cannot be invoked.*
- ii. The bundled offer was in compliance with the guidelines of TRAI.*
- iii. The informant has failed to make any averment of having purchased Apple iPhone of 3G and 3GS to show that he has interest in the matter and has the locus standi to file the information.*
- iv. The informant has failed to state that he had purchased iPhone 3G and 3GS from grey market in India or abroad and consequently it is inexplicable as to how he has a grievance in this regard.*
- v. Apple iPhone 3GS is being sold from June, 2011 without its network being locked. For this reason, the issue raised in the information filed by MrSonam Sharma is academic and infructuous. The practice of locking the network on to the Apple iPhone though in accordance with international practice has been discontinued in India.*
- vi. The iPhone agreement expired much earlier than the date of prima facie order and even the information as a result of which there is no subsisting agreement between Vodafone and Apple in relation to distribution of iPhone in India.*

Objections raised by VODAFONE

- i. The information has been filed by an individual whose Identity is not known. Additionally, the informant has not purchased any iPhone from Vodafone store nor is there any evidence on record to establish that the informant was charged a tariff which was discriminatory and higher than the normal tariff plans for the telecom services offered by*

Vodafone. The entire information is based on conjecture and surmises.

- ii. *The Informant is based out of Faridabad (Haryana) and the relevant Vodafone group entity (incorporated under the provisions of the Companies Act, 1956) which is licensed to establish, install, operate and maintain unified access services and other value added services in that specified service area (i.e., circle) is Vodafone EssarDigilink Limited (VEDL). In accordance with the terms of the license issued by Government of India, VEDL is licensed to operate only in Rajasthan, Haryana and Uttar Pradesh (East). Recently, VEDL has changed its name to Vodafone Digilink Limited pursuant to the fresh certificate of incorporation.*
- iii. *The information primarily related to alleged conduct of VDEL. (being the relevant entity in whose service area the Informant resides and the alleged conducts is sought to have taken place), however the Notice as issued is a clear mis-joinder of the parties.*
- iv. *The Contract of Adherence (COA) was effective for a period of two years with effect from 16.4.2008 and the same is no longer in existence.*
- v. *Any review of the COA or the iPhone Agreement is purely and an academic exercise, especially considering the fact that the agreement, when it was in existence related to miniscule portion of the smart phone market which under no circumstances could have caused any adverse effect on competition in India.*
- vi. *A clause review of the clauses in the agreement reveals the following:-*
 - o *The arrangement was non-exclusive with Apple reserving its rights to sell the iPhone directly or indirectly to any other person.*
 - o *The carrier (i.e, Vodafone) was required to give best telecom service plans (i.e, tariffs to its customers)*
 - o *The carrier (i.e, Vodafone) was to allow the customers to use the unlocked iPhones on its network.*
- vii. *In relation to all three points highlighted above, as the agreement was nonexclusive, iPhones were available in India through a number of other distributors/channels and Vodafone being a telecom service provider provided the best tariff plans to its customers and Vodafone never imposed any restriction on its customers with respect to using unlocked phones. Therefore, there can be no violation.*
- viii. *The tariff plans as were provided to iPhone customers were the same and if not, even better than the normal plans offered to other subscribers. Further, the tariff plans, as approved by Apple were filed with the TRAI in August 2008 and were in full compliance with the*

TRAI regulations. Additionally, it is important to note that even if an iPhone specific plan was published, the customers always had complete freedom to choose from other plans which were not iPhone specific and rather the customer were spoilt for choice, given the range of plans available to them. Therefore, there is no question of Vodafone being able to discriminate with iPhone customers' vis-à-vis its other customers.

- ix. As a general matter, tariff plans for the provision of telecom services provided under the conditions of the license are under the purview of the TRAI and the same have to be intimated to the TRAI to ensure that the tariff plans are consistent with the regulatory principles in all respects which, inter alia, include IUC (inter-connection usage charges) compliance, non-discrimination and non-predation. Therefore, there exists a special regulation which governs the operations of telecom service providers, including Vodafone, and any issues in relation thereto clearly falls within the scope of the TRAI and Telecom Dispute Settlement & Appellate Tribunal (TDSAT).*
- x. Additionally, MNP guidelines issued by TRAI that allow customers to move freely between various service providers do not leave any room for restricting customers from moving (to other service providers). Any issues in relations to restriction on movement of customers between telecom service providers would also clearly fall within the purview of the TRAI and or TDSAT.*
- xi. As stated earlier, since there is a special regulation which governs the operations of telecom service providers including Vodafone, any allegations of “over-charging” by Vodafone would purely fall within the ambit of examination by the TRAI or TDSAT. Based on the above, in so far as the allegations in relation to tariff plans are concerned these clearly fall within the ambit of the TRAI and the special legislation in this regard, as applicable. Therefore, any investigation in relation to issue of tariffs clearly falls within the scope of the TRAI and TDSAT only and not any other authority, and if considered by any other authority including the hon'ble commission, would in effect amount to transgressing into the TRAI's and TDSAT's jurisdiction.*
- xii. The information and the prima facie order which forms the basis of notice, proceeds on the presumption that Vodafone along with Airtel has more than 52% of share of the GSM market and, therefore, are jointly dominant.*
- xiii. The concept of “collective dominance” is not recognized under section 4 of the Competition Act. Both Airtel and Vodafone are separate legal entities with no structural links and with completely different board of directors and management. Therefore the question of “collective dominance” does not arise.*

- xiv. *The iPhone agreement is no longer in existence and therefore, the investigation in so far as Vodafone is concerned is not going to lead to any plausible conclusion nor can any relief be granted against Vodafone, assuming but without admitting, that the alleged conduct is considered to be anticompetitive. Therefore, there is no continuing conduct of the alleged infringement.*
- xv. *iPhones are easily available in the open market and without any network locking. More importantly even the iPhones bought through Vodafone channels were unlocked as and when a request was made after following the due process. Further the TRAI's MNP regulations allow a customer to move from one service provider to another freely and consequently, the same customer can unlock his phone without any hassle. These facts clearly indicate that the allegations in the information are mere speculations and should be dismissed outright.*
- xvi. *The investigation is limited to the iPhone Agreement and tariffs associated with it and consequently, any investigation into the 3G licenses clearly goes beyond of the Commission. iPhone 3G or iPhone 3GS has nothing to do with the telecom license, far less a 3G license, of Vodafone.*
- xvii. *There are no merits to the allegations raised by the informant. It is a well known fact that the Indian Telecom sector is highly competitive with a large number of service providers fiercely competing for market presence. As a result, the charges for the usage of telecom services in India are one of the lowest in the world. Further, the market for mobile phone in India is also highly competitive, dynamic and continues to see a large number of new entrants, which have displaced erstwhile stalwart players in the market.*
- xviii. *iPhone agreement expired much earlier than the date of the Prima Facie Order and even the Information as a result of which there is no subsisting agreement between Vodafone and Apple in relation to distribution of iPhones in India. Any sale of iPhones through Vodafone channels (or its affiliated company) after the expiry of the agreement was purely a commercial decision to clear the existing unsold inventory. Further, even during the continuance of the iPhone agreement and even as of today, as will be demonstrated hereafter, both Vodafone and Apple had and have small shares of the potential relevant markets for provision of cellular telecom network services and smartphone, respectively, that it could not possibly have an adverse effect on competition, much less, an appreciable adverse effect in India in terms of the competition Act.*

- xix. *In any case, the informant has failed to define the precise nature and scope of the relevant market(s) before proceeding to make allegations of an infringement of sections 3(3)(b) and 4 of the Competition Act.*
- xx. *Vodafone is a service provider of voice and data services, including internet connectivity to its customers and hence they do not control or restrict its customers from downloading applications which may or may not be authorized by Apple.*
- xxi. *After the expiration of the iPhone agreement, there can not even be any continuing conduct by Vodafone pursuant to any infringing agreement as sought to be alleged by the informant.*
- xxii. *The Commission may not have the jurisdiction to examine the issues which clearly fall within the ambit of the TRAI especially in relation to the tariffs set for consumers.*

The above issues were examined by the DG. Those concerning jurisdiction of CCI was taken up separately while objections pertaining to contraventions were handled as part of the investigation on allegation.

Jurisdiction of CCI

13. Regarding the jurisdiction of CCI contested by Airtel, DG has submitted that notwithstanding the fact that activities of Cellular Service Providers in India are regulated by a Sectoral Regulator, any competition issues arising out of the activities and practices of these entities would fall within the ambit of the provisions of the Competition Act under section 62 of the Act. Accordingly, DG has submitted that there is no basis for contention of the opposite party regarding jurisdiction of CCI.

Date of agreement prior to the enactment

14. On the issue of applicability of the Act to events prior to its notification, DG has referred to the decision of the Hon'ble High Court of Bombay in W.P. No. 1785/ 200, Kingfisher Airlines Ltd. v. Competition Commission of India decided on 31.03.2010. In this decision, it was held that though the Act is not retrospective, it would cover all agreements covered by the Act though entered into prior to the commencement of the Act but sought to be acted upon now i.e. if the effect of the agreement continues even after 20.5.2009. DG has submitted that even though in the instant case the alleged anti-competitive Arrangement / agreement was started before coming into force of sections 3 and 4, the Commission has the jurisdiction to look into such conduct as it continued even after the enforcement of relevant provisions of the Act.

Discontinuance of certain practices

15. On the argument that certain practices under examination have since been discontinued and as such have become irrelevant, and no longer actionable, DG has submitted that despite the subsequent developments, the period during which the alleged practices continued would need to be examined for infringements, if any, in terms of the Act and have thus been investigated.

Credentials of the Informant

16. On the objection of the opposite parties that the Informant had not purchased the iPhone from them in India and their contention that as such there is no cause for examining his allegation, DG has submitted that the Informant did use the iPhone in India and availed the cellular services of the providers in India. Further, DG has submitted that there is no mandatory requirement for the informant to be a directly affected party.

Having dealt with the preliminary issues, the DG, then, proceeded to investigate the allegations of anti-competitive conduct of the opposite parties.

Investigation of Section 3 violation

17. As submitted by DG, Apple iPhone 3G and 3GS were launched in India in August 2008 and March 2010, respectively. Further, since Apple India did not own or operate retail stores in India, its marketing activities for iPhones were done by Mobile Network Operators (MNOs) or through Authorized Premium Resellers (APRs) through non-exclusive distribution agreements with tenure of two to three years. On the basis of data submitted by Apple India, DG has quoted volume-wise sales of iPhones 3G/3GS made by MNOs and authorized re-sellers during FY 2008-09, FY 2009-10 and FY 2010-11 as 41590, 23080 and 16180, respectively. Against this background, DG investigated section 3 violations by the OPs.

Exclusive agreement of undisclosed duration

18. Apple entered into distribution arrangement with Airtel on 17.03.2008 and with Vodafone on 16.04.2008. DG has found that upon expiration, the agreement entered by Vodafone was not renewed, while agreement with Airtel was renewed with certain amendments. An agreement with Aircel was entered by Apple on 11.03.2011. DG has also submitted that Apple had approached other network operators like Reliance Communications, Idea Cellular, Tata DoCoMo to enter into a distribution agreement for selling iPhone but it did not materialize. It has also been submitted by DG that the agreement entered by Apple in India with various MNOs were for a specified period of two-three years at a given point of time. In view of the foregoing, DG has concluded that the agreement of Apple India and Apple Inc with Airtel and Vodafone for distribution and sale of 3G and 3GS models of iPhones was neither exclusive

nor for very long / undisclosed duration. Accordingly, these agreements do not breach provisions of Section 3(4)(c) of the Act.

Tie-in arrangement

19. DG has found that iPhones sold in India were in a locked state. While Apple contended that locked iPhones were supplied based on specific orders placed by Airtel and Vodafone, the latter have submitted that there was no such option available to them in terms of the arrangement and that they were to purchase only locked iPhones. In view of the lock-in, the purchaser of an iPhone was necessarily required to subscribe to the cellular service of the MNO through whom it was bought. DG has found this arrangement between Apple, Airtel and Vodafone to be in the nature of tie-in arrangement as specified under Section 3(4) of the Act.

Appreciable adverse effect on competition

20. Having established that there was an agreement between Apple and Airtel / Vodafone for sale of locked iPhones in India, DG then proceeded to investigate whether there was any appreciable adverse effect on competition of the aforesaid tie-in arrangement in the GSM cellular service market, in terms of the provisions of Section 19(3) of the Act. DG is of the view that *'the tie-in arrangement, to some extent, did have an adverse implication on the purchaser of iPhones in terms of their ability to choose and switch between various cellular service providers and data plans'*. To that extent, DG is of the view that there has been denial of business opportunities to other cellular service providers. Quoting from the IDC report on the market share for smartphone in India, DG has submitted that Apple had a market share of 1.5% in the year 2008; less than 1% in 2009 and 2010 and 2.4% in 2011. Additionally, DG has submitted that at the time of launch of iPhone in India, there were about 250 million GSM mobile subscribers which subsequently rose to about 600 million in the year 2011. Using this data, DG has concluded that the sale of 3G and 3GS iPhones of Apple in India since its launch in 2008 till 2011 was small in absolute terms as well as in terms of percentage of the overall sale of smartphones of various brands and that the corresponding number of subscribers using iPhone to the total number of GSM subscribers is miniscule. Thus, DG has concluded that the tie-in arrangement would not have materially and adversely impacted the competition by creating any entry barrier for new entrants; driving existing competitors out of the market; foreclosure of competition by hindering entry into the market. Accordingly, DG has held that there is no appreciable adverse effect of the tie-in arrangement of Apple with Airtel and Vodafone on competition in the GSM cellular service market in terms of Section 19(3) of the Act.

Internet Plans

21. DG has observed that in terms of the agreements, both Airtel and Vodafone were required to offer iPhone specific internet plans on the same or better

terms than those offered to other customers. DG has stated that analysis of various internet plans offered by OP3 and OP4 did not reveal any indication of iPhone specific internet plans of Airtel being more expensive than other data plans. As regards Vodafone, DG has found that on account of the technical specifications stipulated in APN settings, only iPhone specific plans of Vodafone could have been used on iPhones till September 2010.

Third party downloads

22. As regards allegations pertaining to restrictions imposed by Apple for downloading third party applications, DG has submitted that investigation did not reveal any evidence to indicate anti-competitive effect of the practice of Apple allowing downloading of those applications which are based on its operating system. In this context, DG has observed that while there are other alternate online application stores such as Google play etc. from where applications can be downloaded on other handsets, most of the application stores undertake some monitoring to deal with threats from malware, virus etc. Hence DG did not consider it appropriate to make a case in this regard.

Investigation of Section 4 violation

23. According to DG, the issues under examination relate both to sale of locked iPhone with cellular services and data plans for using these handsets, the relevant market(s) have to be delineated.
24. Mobile services can be offered through two competing technologies and that SIM cards of each of these cellular services are compatible only with those handsets which deploy their respective technology. According to DG, there is no substitutability between GSM and CDMA cellular services. For any handset and only one of these cellular services can be used depending on whether the handset is CDMA or GSM compatible. Since iPhones are based on GSM technology, for the purpose of present investigation, DG has considered only GSM cellular services as relevant.
25. Regarding the handset market, DG has submitted that on account of certain distinguishing features / characteristics, handsets can be broadly classified as smart phones and feature phones. While acknowledging that iPhone is a unique product, DG has pointed out that there are certain smart phones offered by other brands such as Nokia, Blackberry, Samsung that have advanced features and which could be considered as substitutes for the iPhone. Further, in case of technologically driven products and industries characterized by rapid innovation, the DG holds the view that availability of substitutable products has to be assessed over a period of time rather than at a given point of time.
26. In line of above arguments, DG has identified two distinct relevant markets in terms of the provisions of the Act namely; (i) relevant market for smart phones

in India and (ii) relevant market for GSM cellular services in India. Referring to the IDC Smartphone Report, according to which iPhone had a market share of less than 3% during 2008-11 in terms of volume and less than 6% in terms of value during the same period, DG is of the view that market share of Apple iPhones was low both in terms of value and volume. Further, DG has submitted that there are several other brands of smartphones having market share greater than Apple iPhone. On this ground, DG has submitted that Apple could not be said to be in a dominant position. Further, the investigation also took into account dynamic nature of smart phones characterized by rapid innovation and replication which, according to DG, ensured robust competition on an ongoing basis. Considering these aspects, investigation did not find Apple to be dominant entity, possessing market power in the relevant market of smart phones in India.

27. As regards cellular service market, the GSM cellular services market is fragmented and there are several active cellular service providers. DG did not find either Airtel or Vodafone to be dominant in the relevant market of GSM cellular services. Consequently, no further examination was done by the DG on the alleged abusive conduct of Apple, Airtel and Vodafone.

Concluding Remarks: DG Report

28. Based on above findings, DG has concluded that Apple did not enter into any exclusive agreement with Airtel and Vodafone for sale and distribution of iPhones in India. By selling locked iPhones to the network of the distributing MNO, Apple entered into tie-in arrangement with Airtel and Vodafone in terms Section 3(4)(a) of the Act. However, analysis of various data and facts gathered during the investigation did not reveal any appreciable adverse effect on competition in the cellular service market in India, in terms of Section 19(3) of the Act. Investigation did not reveal any infringement on account of practices regarding use of only authorized applications on iPhones. Hence, no case for violation of Section 3 of the Act has been made. Since, Apple has not found to be dominant in the relevant market of smartphones in India and also neither Airtel nor Vodafone are found to be dominant in the relevant market of GSM cellular service providers in India, therefore, no case has been made out against them for infringement of Section 4 of the Act.

Analysis of the Commission

29. The Commission examined the DG's investigation report and also took cognizance of the informant's submission / objections to the DG Report. The contention of the informant that '*the DG did not analyze relevant market and dominance of the opposite parties properly thereon*' shall be kept in mind while analyzing the allegations pertaining to Section 3 and Section 4 of the Act.

Jurisdictional Issues

30. Two major jurisdictional issues were raised by the opposite parties viz; a) jurisdiction of CCI in this case as it pertains to the jurisdiction of TRAI; b) the applicability of the Act as the case pertains to pre-May 2009. Both these issues were addressed by the DG. The Commission takes note of the juridical issues raised by some of the opposite parties and is in agreement with the view taken by the DG in this regard, as brought out earlier in this Order and therefore settles the issues raised by them.

Competition Issues

31. The allegations in the present case relate to Section 3 on the anti-competitive agreements and to Section 4 on abuse of dominant position of the opposite parties. The specific competition issues that arise from these allegations are:

- i. Appreciable adverse affect arising from such agreements;
- ii. Abuse of dominance by the opposite parties by:
 - a) Imposing unfair conditions in the purchase of Apple iPhones
 - b) Imposing discriminatory conditions on users who had purchased their Apple iPhones from a source other than OP 3 and OP 4
 - c) Indulging in such concerted practices under the agreements/ understandings between them, which results in denial of access, to the other GSM network providers
 - d) Concluding contracts for the sale of iPhones subject to acceptance by other parties of supplementary obligations
 - e) OP 3 &OP4 using their dominant position in the GSM market to enter and control the iPhone market in India.

32. The case as such has two dimensions to it as can be seen from the informant's allegation of contravention of Section 3 and Section 4. As submitted by DG, Apple iPhone 3G and 3GS were launched in India in August 2008 and March 2010, respectively. Apple India did not own or operate retail stores in India, but preferred to distribute its handsets and related marketing activities through two channels Mobile Network Operators (MNOs) and Authorized Premium Resellers (APRs) by way of non-exclusive distribution agreements with tenure of two to three years. Of significance is that the MNOs are also service providers. The duality of the roles of MNOs permits examination of the contravention of the Act under Sections 3 and 4. Section 3 arises from the agreements between Apple and its distributors and fall within the ambit of vertical restraints on competition elucidated in Section 3(4) of the Act. Contraventions of Section 4 arise from the dominance of the

two sets of players' viz., the iPhone manufacturer (Apple) and service providers (Airtel and Vodafone) in their respective markets.

33. We shall first examine the contraventions arising from abuse of dominant position. The steps required for assessing contravention of the Act are:
 - i. Delineate the relevant market where anti-competitive conduct has been alleged
 - ii. Determine the dominance of opposite parties in the relevant market so defined and
 - iii. Establish if there has been abuse of dominance by the opposite parties in the relevant market.

34. Given the nature of allegations leveled by the Informant and subsequent investigation conducted by the DG thereon, it would be appropriate at the outset to understand the dynamics of cellular phones and their interaction with cellular network services.

Market Dynamics

35. With the advent of mobile telephony, faster and reliable modes of communication have become a reality. With passage of time and with infusion of technology, the mobile handset got transformed from a simple communicating device to becoming a platform for undertaking activities like e-commerce, m-banking, entertainment, m-health etc.

36. In the context of mobile telephony, two distinct entities – the mobile network operators and handset manufacturers create the communication channel wherein the former provides the service and latter sells the hardware to harness the benefits of the service provider. A mobile handset is a complementary product to mobile network service, thereby meaning that unless a mobile handset user has the access to a mobile network services, he would not be in a position to exploit the full utility of the handset. It is observed that, generally, as a part of complementary marketing strategy, handset makers and mobile service providers, although, distinct entities often offer bundled products / services. It has been observed that with the approval of the sector regulator, there have been instances of offering bundled services, wherein mobile service providers offer handsets to their customers that may be locked to their network for a certain time period.

37. As per the data provided by the DG, the Commission has noted the GSM subscriber base in India has shown a phenomenal growth – it stood at 25,82,35,642 in 2008 and has grown to 63,96,37,109 in 2011, a growth of nearly 150%. Taking the GSM subscriber base to be the proxy for the handset market (as every subscriber requires a handset to use mobile services), the story of handset sales in India is no different. It is a resilient market with presence of more than 20 companies competing in a space which is growing by about 15%, as per the data pertaining to H1 2012 as per a

market research group, CMR (<http://cmrindia.com/india-mobile-handset-shipments-cross-100-million-units-in-the-first-six-months-of-2012/>). Another Report of CMR 'India Mobile Handsets Market Review, 2Q 2012, September 2012', during H1 2012 (January-June 2012), total India shipments of mobile handsets was recorded at 102.43 million units. In India, handsets are available from plethora of manufacturers in practically every price range - from few hundred rupees to about half a lakh rupees.

38. Handsets can be primarily characterized as being one of the three: (i) basic phones; (ii) feature phones and (iii) smart-phones. While the basic phone is equipped for call and text messaging services, the other two have more advanced features. There is no industry standard definition of a smartphone, but rather a spectrum of functionalities that defines a particular brand of smartphone. A significant difference between smart-phones and feature phones is that the advanced application programming interfaces (APIs) on smart-phones for running third party applications can allow those applications to have better integration with the phone's operating system and hardware. In comparison, feature phones more commonly run on proprietary firmware, with third-party software support through platforms such as Java ME or BREW. Further categorization on the basis of operating system, hardware configuration, other functionality, 2G/3G/4G etc is also possible to distinguish a particular handset. Presumably, price of the mobile handsets increases progressively and discreetly with the inclusion of additional functionalities / features.
39. The present case deals with the smartphones, which are at the highest end of mobile handsets. In addition to mobile phone functionality, many modern smartphones typically also serve as portable media player and camera phone with high-resolution touch-screen, web browsers that can access and properly display standard web pages rather than only mobile-optimized sites, GPS navigation, Wi-Fi and mobile broadband access. Presently, smartphones are manufactured by various competing companies such as Apple, Samsung, Nokia, LG, HTC, Micromax, Sony etc. It is notable that each manufacturer has several variants of smartphones, available in different price-bands.

In this dynamic scenario, we now proceed to examine the case from the lens of competition.

Relevant Market

40. Section 2 (r), (s) and (t) of the Act define the relevant market. Further, Section 19(5), (6) and (7) of the Act gives the guidelines for determining relevant market.
41. The Informant has averred that features offered on iPhone are exclusive only to it, because of which an iPhone cannot be substituted by any other smartphone available in the market. While saying so, we infer that the

Informant is referring to the relevant market as consisting of Apple iPhones. On the other hand, while defining relevant market, DG has held that *“in case of technologically driven products and industries characterized by rapid innovation the availability of substitutable products has to be assessed over a period of time (few months or year/s) rather than at a given point of time”*.

42. As stated earlier, DG has made a distinction between a smartphone and a normal phone in as much as the former is capable of running larger menu of third party application. While acknowledging the fact that iPhone offers certain distinguishing features such as multi-touch screen-pad replacing the traditional physical keypads, light detecting and proximity sensors, DG has held that it belongs to the category of smartphones, competing with other smartphones offered by other companies.
43. Furthermore, in view of the allegations on the service providers, DG has considered it appropriate to include a second relevant market in the present case – that of mobile network service. On the cellular network services market, DG has observed that the same can be classified under two heads namely GSM and CDMA, based on the underlying technology. Further, SIM cards of each of these cellular services are compatible only with those handsets which deploy their respective technology. On account of such technological differences, DG has submitted that there is no substitutability between GSM and CDMA cellular services. It has also been submitted by the DG that iPhones (in India) are based on GSM technology. The DG has found that the cellular network of most of the GSM cellular service providers in India at the time of launch of iPhones was technologically compatible for use of iPhones. Hence unless the iPhones were specifically locked to a particular GSM network, the users could have used the network of any of the existing cellular service providers in India.
44. Taking into consideration the provisions of the Act and the issues under investigation relating to the sale of the locked iPhone and cellular services and data plans for using these handsets, two separate relevant markets have been identified by the DG as following:
 - Market of GSM Cellular Services in India.
 - Market for smartphones in India

View of the Commission

45. In terms of the provisions of the Act, relevant market has to be defined in terms of product-substitutability from demand perspective. It is worth noting that relevant market has two dimensions - product and geography. The DG has delineated two distinct relevant markets in the present case. The Commission will examine the aspect of two markets and opine on the delineation of the two markets in subsequent paragraphs. Concerns of the informant on the definition of the relevant market raised in his oral response to the DG's Report will be addressed in the subsequent paragraphs.

A. Mobile Telephony Market

46. From the public documents available on the internet as also from the Information and the DG Report, it is apparent that products of Apple have been defying the conventional norms – they come with innovative features that offer qualitative leap over their rivals. No doubt, some people might have a preference for Apple products like iPhone but to qualify it as a niche segment, it is required that no other competing products offer similar products and that the target customers perceive it as being the ‘only’ product in the market. If it were so then, the relevant market would have been that of iPhones. The Commission finds it difficult to define the relevant market as just consisting of iPhones. Such single-brand markets are rarely tenable. Relevant markets generally cannot be limited to a single manufacturer’s products. The Commission views reasonable interchangeability between iPhones and other smartphones. iPhone is a part of bigger segment of mobile handset i.e. the smartphone market. Comparisons of features and prices of different smartphones are done and referred to that includes iPhone along with other smartphones. Apparently, Apple views Samsung, Nokia, Blackberry etc as its competitor in the smartphone market in India and similarly other smartphone manufacturers also offer their products in direct competition with iPhones.
47. In view of the above discussion and in the absence of any specific finding that Apple iPhone constitutes a distinct market; the Commission has reasons to believe that the true relevant market is the market of smartphones in India, in line with the approach and reasoning of the DG.

B. Cellular Telecom Services Market

48. There are two competing technologies that offer commercial mobile telephony – (i) GSM and (ii) CDMA. The handset to be used for availing service from any of these cannot be used to avail the service from other. Even from the supply side, the two are not substitutable in as much as each require set of equipments that are not compatible with other. In our analysis, since iPhone is offered only for GSM module in India and that specific allegation has been brought against two GSM service providers, the Commission shall limit its analysis to the GSM service market.
49. The mobile network service in India is divided into distinct telecom circles, also known as licensing areas, with majority of the circle having 6-7 operators. It is important to take note of the fact that each telecom circle has different valuation and accordingly the license fee varies across each circle. Further, a mobile service operator can operate only in the license area for which license has been granted. From a consumer’s perspective, calling a subscriber within a telecom circle, irrespective of physical distance between the two, is treated as local call and any call terminating in other license area is treated as long-distance (STD) call. There is substitutability of availing mobile network services to the extent that consumers have a choice of availing services from competing service providers that have been given license in a

particular license area. Thus, from the point of view of both - mobile service operators and mobile service subscribers, one license area is distinct from another.

50. It is important to note that the agreement between Apple and Vodafone / Airtel to sell locked phones in India did not envisage locking the iPhone to a particular license area. Rather, it is apparent that locking was to a particular carrier irrespective of the service area in which they were bought in, thereby meaning that, as an example, iPhone purchased from Airtel could be made functional by inserting Airtel SIM in any service area in which Airtel was licensed to offer mobile services.

51. In view of the above discussion and in consonance with the definition of relevant market in respect of cellular telecom services market as proposed by the DG, the Commission opines that the relevant market is the market for GSM mobile services in India.

52. To sum, the two relevant markets identified for the purpose of present case are:

- Market for smartphones in India; and
- Market for mobile services in India.

Dominance

53. Dominant position has been defined under Explanation to Sec 4 as

“...position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to—

- (i) operate independently of competitive forces prevailing in the relevant market; or*
- (ii) affect its competitors or consumers or the relevant market in its favour.*

Section 19(4) of the Act lists guiding conditions under which an enterprise may be viewed as having a dominant position.

54. The Informant has submitted that Apple is the largest selling smartphone worldwide. It has also submitted that by the end of fiscal year 2010, a total of 73.5 million iPhones have been sold. Hence, OP1 enjoys dominant position in the smartphone market worldwide including India where it enjoys such a position through OP2.

55. Quoting the IDC *Smartphone Market Share for India (2008-2011)* and other reports cited by DG in its investigation report, DG has observed that in terms of volume, Apple India had a share between the ranges of 1%-3% in the smart-phone market during the period 2008-11 in India. The DG, then, proceeded further and analyzed the other factors to be considered for

determining dominance of an enterprise and found that OP1 and OP2 are not in a dominant position in the relevant market of smart-phones in India.

View of the Commission

56. There are two issues that need to be highlighted before commenting on the dominant position of the opposite parties. Firstly, the business model / strategy of Apple in India need to be emphasized. At the time of launch of iPhones in India, Apple did not have its own retail stores. It might have been a conscious decision of Apple to sell the iPhones through existing mobile network operators (MNOs) in a locked state apart from APRs. This arrangement suited both Apple and MNOs since the former did not have to incur establishment / marketing expenditures while the latter were guaranteed of turf-client for the period of lock-in. In any case, the locked-in customers had the option to get their phone unlocked by paying some fees. It is observed that similar arrangement has been made by Apple in many countries where it launched its iPhones. For instance, in the US, AT&T has been the exclusive network of the iPhone.
57. Secondly, the Commission notes that while the Informant has submitted that information pertains only to iPhone 3G and 3GS, it is not clear whether data relied in the information to portray Apple's position includes all variants of iPhone. In the opinion of the Commission, relevant market cannot be segmented variant-wise (as has been proposed by the Informant) unless it is established that different variants have such distinct characteristic so as to be viewed as a distinct product by the customers - the only test that has been enshrined in the Act is substitutability / interchangeability from demand perspective.
58. Coming to the issue of dominance of Apple, it is noted from various independent reports that Apple's share in smartphone market in India was around 3% during 2008-11. On this screening criterion, the argument of Apple's dominance falls flat. However, the DG has analyzed dominance of other factors as envisaged under 19(4) conditions and has concluded that even then, Apple cannot be said to be in a dominant position. The Commission endorses the view of the DG.
59. As regards the dominance of OP3 and OP4 in the second relevant market, the DG has held on the basis of section 19(4) conditions that neither Airtel nor Vodafone has adequate market power so as to be deemed dominant. Also, the argument made by the Informant that OP3 and OP4 hold nearly 52% of market share in the GSM services in India cannot be accepted for the fact that they are horizontal competitors who fight for greater market share. Moreover, there is no allegation qua these OPs that they have indulged into anti-competitive conduct among themselves for a common cause.

60. According to the data available on the website of Cellular Operators Association of India (COAI), Group Company wise percentage market share in terms of GSM subscribers for the month of December 2012 is as follows:

Sl. No.	Name of Company	Subscribers (actual)	Market Share (%)
1	BhartiAirtel	18,19,06,892	27.68%
2	Vodafone Essar	14,74,76,290	22.44%
3	IDEA	11,39,46,827	17.34%
4	BSNL	9,71,72,146	14.79%
5	Aircel	6,33,47,284	9.64%
6	Uninor	4,15,20,544	6.32%
7	Videocon	36,40,312	0.55%
8	MTNL	51,19,179	0.78%
9	Loop Mobile	30,28,539	0.46%
	All India	65,71,58,013	100.00%

Source: <http://www.coai.com/statistics.php> - Subscriber Figures for Dec 2012

From the above data as also the data submitted by the DG, it is observed that none of the OPs can be deemed dominant in terms of respective market share in the relevant market and other Section 19(4) conditions.

61. An issue has been raised by the Informant, submitting that OP3 and OP4 hold more than 50% of GSM market, thereby making them dominant in the market. The Commission notes that there is no indication of any sort of agreement between them (OP3 and OP4) that could be deemed anti-competitive. Therefore, it is not relevant to take cognizance of this piece of information in the given context, more so when they are competitors in the same market.

62. In view of the above discussion, Commission opines that since dominance does not get established, there can be no case for abuse of dominance under Section 4 of the Act.

Anti-competitive agreement

63. Having opined on AoD aspect, the Commission shall now give its view on the agreement between Apple and Airtel / Vodafone that has been alleged to be 'anti-competitive'.

64. According to Section 3 of the Act, "*No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India*". Section 3(4) of the Act highlights

anti-competitive agreements between vertically related enterprise as “*Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including—*

- (a) *tie-in arrangement;*
- (b) *exclusive supply agreement;*
- (c) *exclusive distribution agreement;*
- (d) *refusal to deal;*
- (e) *resale price maintenance,*

shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India”.

Further, what constitutes appreciable adverse effect on competition has been provided for in Section 19(3) of the Act.

65. The allegation is focused on what is referred to as a lock-in arrangement between the handset manufacturer and service-provider by the Informant. At this stage, it is worthwhile to distinguish between tie-in and bundling as these two terms tend to be used interchangeably in common parlance especially in marketing strategies. Anti-competitive concerns, however, require a distinction in the two terms that an agreement sets out. Furthermore, an agreement, as in the present case, the Commission has carefully reviewed the tie-arrangement in the context of the dual roles of the service provider. On one hand the service providers are independent mobile telephony providers including internet services and on the other are distributors of iPhone. A tie-arrangement, therefore, must be assessed with respect to foreclosure in the handset market and to foreclosure in the service market; and whether the agreement results in consumer harm. Moreover, the Commission also notes that Apple’s exclusive agreement with the two service providers was announced and widely known, and that consumers were informed at the time they purchased their iPhones of the necessity of these tied cellular services, which in themselves were not exclusive as iPhone could be purchased both with an Airtel and a Vodafone service.

66. A tying arrangement occurs when, through a contractual or technological requirement, a seller conditions the sale or lease of one product or service on the customer’s agreement to take a second product or service. In other words, a firm selling products X and Y makes the purchase of product X conditional to the purchase of product Y. Product Y can be purchased freely on the market, but product X can only be purchased together with product Y. The product that a buyer is required to purchase in order to get the product the buyer actually wants is called the tied product. The product that the buyer wants to purchase is called the tying product. Examples of tying include the tied sales of machines and complementary products, the tied sales of machines and maintenance services, as well as technological ties that force consumers to buy two or more products from the same supplier due to

compatibility reasons. More often, tying is a sales strategy usually adopted by the companies to promote / introduce a slow-selling or unknown brand when it has in its portfolio a fast-selling or well known product, over which it has certain market power.

67. Price bundling is a strategy whereby a seller bundles together many different goods / items for sale and offers the entire bundle at a single price. There are two forms of price bundling - pure bundling, where the seller does not offer buyers the option of buying the items separately, and mixed bundling, where the seller offers the items separately at higher individual prices. From producers perspective, mixed bundling is usually preferable to pure bundling, both because there are fewer legal regulations forbidding it, and because the reference price effect makes it appear even more attractive to buyers. Bundling is used as a strategic pricing tool by the producers to price discriminate among groups of buyers with different preference schedule in order to capture larger pie of social surplus thus generated.
68. Having discussed tying and bundling, it is important to underscore the fact that there is a subtle difference between the two concepts. The term “tying” is most often used when the proportion in which the customer purchases the two products is not fixed or specified at the time of purchase, as in a “requirements tie-in” sale. A bundled sale typically refers to a sale in which the products are sold only in fixed proportions (e.g., one pair of shoes and one pair of shoe laces or a newspaper, which can be viewed as a bundle of sections, some of which may not be read at all by the customers). Bundling may also be referred to as a “package tie-in.” It is also true that various foreign courts have occasionally used the two terms interchangeably.
69. On the other hand, anti-trust concerns are raised in the case of tie-in as held in section 3(4) (a), although per se it is not anti-competitive. Therefore, the Commission has been at pains to distinguish between a tie-in arrangement and bundling in this specific case. Economics literature suggests that there are pro-competitive rationales for product-tying. These include assembly benefits (economies of scale and scope), quality improvement as also addressing pricing inefficiencies. Generally, the following conditions are necessary and essential in respect of anti-competitive tying:

1. Presence of two separate products or services capable of being tied:

In order to have a tying arrangement, there must be two products that the seller can tie together. Further, there must be a sale or an agreement to sell one product or service on the condition that the buyer purchases another product or service (or the buyer agrees not to purchase the product or service from another supplier). In other words, the requirement is that purchase of a commodity was conditioned upon the purchase of another commodity.

2. The seller must have sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product:

An important and crucial consideration for analyzing tying violation is the requirement of market power. The seller must have sufficient economic power in the tying market to leverage into the market for the tied product. That is, the seller has to have such power in the market for the tying product that it can force the buyer to purchase the tied product.

3. The tying arrangement must affect a "not insubstantial" amount of commerce:

Linked with the above requirement, tying arrangements are generally not perceived as being anti-competitive when substantial portion of market is not affected.

70. The present case involves a distribution / sales arrangement between Apple and Airtel / Vodafone is a case of 'contractual tying' wherein the handset manufacturer and service provider have joined hands to offer a packaged product to a customer. Tying arrangements are common in the wireless telecommunications industry. Worldwide wireless networks compete for exclusive contracts to offer popular mobile devices. However, the Commission deliberated on whether such tying arrangements are anti-competitive. An agreement between two parties in a vertical chain to be anti-competitive essentially requires that the intention of such an agreement was foreclosure in both the relevant markets resulting in considerable consumer harm. But as pointed out that for a vertical agreement to be anti-competitive requires the monopolization claim to hold, and given the minuscule market share of the tying party the monopolization claim will be contrived. Nevertheless, we assess this agreement in the framework of 19(3)(a) (b) and (c) by posing the following questions:

- Does this agreement prevent Airtel and Vodafone customers to use other smart phones?
- Does the agreement prevent unlocked iPhone users to use services of other mobile service provider?
- Consequently, is there a foreclosure effect of the agreement on any of the two markets – smartphone and mobile services?

71. Given the fact that none of the opposite parties (Apple / Airtel / Vodafone) have dominant position in their respective market, as discussed earlier and that there has been no intention and evidence to show that market has been foreclosed to competitors or that entry-barriers have been erected for new entrants in any of the markets by any of the opposite parties, the anti-competitive analysis of the tie-in arrangement shall be made while addressing the above questions.

72. In this case, it is found that a consumer interested in buying an iPhone is tied to one of the two mobile networks i.e. Airtel or Vodafone. It is worth noting that at the time of launch of iPhone in India, Apple did not have an outlet to sell its iPhone, a high-end smartphone. Instead of investing money on creating sales and service outlet and incurring advertisement expenditure, Apple's strategy was to have tactical agreement with network operators, possibly the best partners for selling mobile handsets. This arrangement also helped Apple in gauging the public perception for iPhone before actually selling iPhone through its own retail stores. The mobile network companies who spent money on creating distribution channel and incurring advertisement expenditure wanted the iPhone to be locked-in for some period so that they would be able to recoup their investment over a period of time.

73. To assess the alleged anti-competitive effect of the tie-in arrangement between Apple and Airtel / Vodafone in line with Section 19(3), the Commission examined the following:

A. Share of markets: Market share of Apple iPhone in the smartphone segment; subscribers using Apple iPhone as a percentage of total GSM subscriber.

B. Sanctity of exclusivity under multiple arrangements of Apple with other service providers as well as premium resellers, apart from the cited opposite parties.

C. Effect of the tie-in arrangement between a handset manufacturer and a service provider vis-à-vis consumer choice.

74. Relying on the market share statistics of smartphones in India as provided by the DG, the Commission observes that Apple had a share of less than 6% in the market of smart phones during the period 2008-11. Furthermore, share of GSM subscribers using Apple iPhone to total GSM subscribers in India is miniscule (less than 0.1%). Similarly, relying on the data provided by the DG on mobile service provider, the Commission observes that no operator has more than 35% market share in an otherwise competitive mobile network service market. As none of the impugned operators (OP3 / OP4) have market-share exceeding 30%, that smartphone market in India is less than a tenth of the entire handset market and that Apple iPhone has less than 3% share in the smartphone market in India, it is highly improbable that there would be an AAEC in the Indian market.

75. In the present case, the Commission notes from the DG's investigation that Apple iPhone had approached several service providers to sell its handset without exclusivity as regards the service provider. Apart from service providers, these handsets were also sold through the Apple Premium Resellers (APRs). The exclusivity argument put forward by the Informant flies

in the evidence of multiple choices for both purchase of iPhone as well as network service provider for consumers.

76. The Commission also notes that a consumer having a mobile handset (smartphone or otherwise) is free to exercise his choice for availing network services without any restrictions. Furthermore, the network operators do not require any particular handset to be purchased by the customer in order to avail its network services. Moreover, the lock-in arrangement of iPhone to a particular network was for only for a specific period and not perpetual, a fact known to prospective customer. It is difficult to construe consumer harm from the 'tie-in' arrangement between the opposite parties. The Commission observes that there is no restriction on consumers to use the network services of OP3 and OP4 to the extent that the network services can be availed on any mobile handset, even an unlocked iPhone purchased from abroad. Also, a consumer who has purchased a locked iPhone in India and paid the unlocking fees is free to choose the network operator of his choice.
77. On the basis of facts submitted by the DG, none of the OPs have a position of strength to affect the market outcome in terms of market foreclosure or deterring entry, creating entry barriers or driving any existing competitor out of the market and within the theoretical framework of tying arrangement, the anti-competitive concerns in terms of section 3(4) violations does not hold. On the other hand, Commission has reasons to believe that the distribution arrangement between the impugned parties helped create a market for iPhone in India wherein domestic consumers got an opportunity to purchase a contemporary handset which was otherwise available through the grey market.
78. The Commission does not find any evidence to show that entry-barriers have been created for new entrants in the markets i.e. smartphone market and mobile services market by any of the impugned parties. Similarly, nothing has been brought to the notice of the Commission to reveal that existing competitors have been driven out from the market or that the market itself has been foreclosed.
79. Under these circumstances, on the basis of the counter-factual posed, the Commission opines that there is no anti-competitive effect of the tie-in arrangement as alleged by the Informant. In fact, there is some suggestion in the literature that the earlier tying arrangement between the iPhone and the service providers in other jurisdictions may have spurred wireless service providers to invest in innovation in mobile devices. Such innovation has resulted in an explosion of new mobile devices and continued growth of the mobile communications industry. It has not caused the disastrous results on competition or the formation of double-monopolies that some have feared. Hence, the belief that the tying arrangement has caused serious harm is misplaced,

80. In view of the foregoing, there is no case in terms of Section 3(4) violation.

ORDER

On the basis of investigation and examination of the data the Commission does not find the OPs in a dominant position in their respective relevant market to establish violation of Section 4(2),(a),(b),(c),(d) and (e). No appreciable adverse effect on competition in the market of smart-phones and/or mobile service has been established, there is no contravention of Section 3 (4) of the Act. Accordingly, the case is ordered to be closed.

Secretary is directed to forward a copy of this Order to the concerned parties, in terms of relevant provisions of the Act.

**Sd/-
H C Gupta
(Member)**

**Sd/-
GeetaGouri
(Member)**

**Sd/-
AnuragGoel
(Member)**

**Sd/-
M L Tayal
(Member)**

**Sd/-
Justice S N Dhingra (Retd)
(Member)**

**Sd/-
Ashok Chawla
(Chairperson)**