

COMPETITION COMMISSION OF INDIA

Case No. 2 / 2009

Date: 24.03.2011

COMPLAINANT:- Consumer Online Foundation,
D14 (FF) GK-II, New Delhi -110048

RESPONDENT:- 1) Tata Sky Limited
2) Dish TV India Limited
3) Reliance Big TV Ltd.
4) Sun Direct TV Pvt Ltd.

ORDER UNDER SECTION 27 OF THE COMPETITION ACT

As per R. Prasad, Member (dissenting)

In this case information was received in respect of anti-competitive behaviour by the above named four respondents. The details are as follows:-

Brief of the Case

The present memorandum was filed by Shri Bejon Misra, Trustee, Consumer Online Foundation, alleging contravention of various provisions of the Competition Act, 2002 by the four DTH service providers named above.

- (ii) The complainant has alleged that the above mentioned four Direct to Home (DTH) service providers are limiting competition among themselves, forcing the consumers to buy bundled hardware and creating entry barrier for new hardware manufacturers. These practices are anti competitive and violate Sec 3 & 4 of Competition Act, 2002.

- (iii) To avail DTH service, a customer requires 4 instruments beside the television.
1) A small dish antenna (usually fixed on terraces) to gather DTH signal, 2) a small radio-size device (usually placed over the TV set and colloquially called set top box) to read the DTH signal, 3) a control instrument (usually incorporated within the STB) called conditional access module CAM which

ensures that the consumer avails only what he has paid for, and last 4) a smart card to identify the user.

- (iv) Ideally the antenna and the STB should be available in the open market and DTH service provider should provide only the CAM + smart card (or possibly only a smart card). So that whenever a consumer wishes he can buy another CAM + card from another DTH service. This way the DTH operators would compete on service, quality and price.
- (v) The DTH operators in the Country are selling CAM + card + STB + antenna bundled together and charging the consumer for all these products. Most popular schemes of the operators state that the consumer gets hardware 'FREE' with 6 month subscription (nearly Rs. 1800). The amount actually includes the cost of hardware, but the operator denies its ownership to the customer and tells him that the hardware is owned by the DTH operator. Moreover, they have manipulated the STB so that it cannot work for any other DTH operator.
- (vi) This way they are able to withhold their customer who is loath to buy the entire hardware again if he wishes to change the DTH operator. The DTH company understands that the customer is stuck and thereafter regularly overcharges him by small amounts in the monthly recharge.
- (vii) Old DTH operators use set top box of MPEG-2 format, while the later entrants have installed the advanced MPEG-4 format. MPEG-4 set top box can work on the type 2 format, but vice versa is not true. Thus, interoperability of older players' instrument is limited.
- (viii) Consumers are entitled to purchase, hire purchase or rent the STB as per government regulations, but the DTH companies hide this option.
- (ix) Consumers are generally unaware that as per government rules, the set top box from one DTH is required to work with smart card of another operator and

also that the consumer has an option to rent, hire purchase or outright purchase the hardware from the DTH operator.

- (x) In US, consumers can buy the STB in open market or from the DTH company, and the service is interoperable. The DTH companies were giving discounts on their STBs and this was hurting other STB manufacturers. The authority mulled banning such discounts, but allowed waiver to the DTH operators for 3 years, primarily because it was benefitting consumers.

2. Allegations

- (i) Tacit understanding among the DTH service providers to reduce competition among themselves by preventing interoperability of the service.
- (ii) DTH service providers limiting competition among them by putting restrictive conditions in the subscription agreement which discourages migration of the consumer.
- (iii) DTH service providers are forcing the consumers to buy / take on rent the STBs along with the DTH service (tie-in or bundling).
- (iv) Exclusive dealing agreements between the DTH service providers and Set top Box manufacturers is suspected.
- (v) By restricting interoperability of the Set Top Boxes (STB), DTH service providers are denying access to market for enterprises which only manufacture STBs and thus abusing their dominant position. Similarly, they are also creating barrier to entry for prospective STB manufacturers who may want to enter the market.
- (vi) Even though DTH service providers are required to provide only DTH service, they are providing service subject to supplementary obligations (consumers take STBs from them).

3. The Commission considered the information and sent the case under Section 26(1) of the Competition Act to the Director General for the investigation. During the course of the investigation, the D.G. called for details from the four operators namely (i) Tata Sky Ltd. (ii) Dish TV India Ltd. (iii) Reliance Big TV Ltd. (iv) Sun Direct TV Pvt. Ltd. The D.G. also extended the enquiry to two more entities who were in the market of providing DTH facility, namely, (i) Airtel Digital (ii) Videocon d2h. The submission made by the six operators before the DG are summarized as under:-

4. Submissions to the DG (Inv.) by the respondents

(i) **Tata Sky**

- a) Tata Sky gives its set top box on outright purchase to customers.
- b) Its set top box complies with extant rules framed by the government.
- c) Its set top box cannot be used for any other DTH service because it uses old format.
- d) It has not sold any stand alone CAM in the market.
- e) It works on prepaid model, so it does not charge customers when service not used.

(ii) **Dish TV**

- a) Its set top box is compliant of extant rules.
- b) Its set top box can work for any other DTH operator.
- c) It does not charge for period when service not availed.
- d) It has sold 571 stand alone CAM to Kingfisher airline.
- e) It has refund partial cost of 30 STBs returned by customers.

(iii) **Reliance Big TV**

- a) Its set top box is compliant of extant rules.
- b) All its set top box are on rental.
- c) It has not sold stand alone CAM.
- d) Its set top box can work for other operators **if authorized**.
- e) It charges Rs. 100 per month for the period that customer does not avail its service.

(iv) Sun Direct

- a) Its set top box is compliant of extant rules.
- b) Its set top box can be used for other DTH operators.

(v) Airtel Digital

- a) The Commission has no jurisdiction in the matter.
- b) Its set top box is compliant of prevailing regulations.
- c) Its set top box is not sold but given without any rent for use by customers.
- d) Its set top box can be used for other DTH operators.

(vi) Videocon d2h

- a) Videocon does not force buyers to accept hardware/set top box from it
- b) Set top box and viewing card is paired to prevent piracy.
- c) It is cheaper to consumer to buy bundled product, rather than separate CAM.
- d) The bundled set top box provided by Videocon enhances customer experience.
- e) Its set top box is compliant of prevailing regulations.
- f) It has not sold any stand alone CAM.

5. After analysing all material submitted during the course of investigation, the D.G. submitted a report of investigation on 24th September, 2009 making out a case of violation of Section 3(3) of the Competition Act. The Commission considered the report and found that the investigations were not complete. Therefore the Commission asked the D.G. for further investigation and report. The D.G. submitted the second report on 3rd December, 2009. The Commission again considered the report and asked the D.G. to make further investigation. The D.G. submitted his third report on 25th January, 2010. The details of the findings of the report are as follows:-

6. Findings of D G (Investigation)

First Report dt. 24/09/09

- (i) The license issued by the Ministry of Information and Broadcasting provides for open architecture STB i.e. interoperability among different service providers. The interoperability is also specified in the standards set by Bureau of Indian Standards (BIS). The BIS standards provides for common slot in the Set Top Box to ensure technical interoperability.
- (ii) To comply with standards and guidelines, the service providers have provided for common slot CAM (Conditional Access Module) in STB for inserting smart card / viewing card. However, none of the DTH service providers provide their CAM independent of the STB for sale in open market, thereby effectively limiting the interoperability.
- (iii) Set top box and the Smart Card provided by the various DTH service providers are customized so that they do not work for any other DTH Service provider.
- (iv) As per TRAI's DTH (Standards of quality of service and redressal of grievances) Regulation 2007, DTH service providers are supposed to provide three options i.e. outright purchase, hire purchase and rental for STB. These options are seldom offered to customers.
- (v) TRAI's DTH (Standards of quality of service and redressal of grievances) Regulation 2007, DTH service providers are prohibited to disable DTH set top boxes and discontinue the Free to Air Channels in case no dues are pending from the customers. The DTH operators ignore the rule.
- (vi) Interoperability is desired by the licensor (Mol & B) and the regulator (TRAI) but it has never been achieved or enforced by them.
- (vii) Most STBs are given under outright sale to the customer. Yet, DTH service providers refuse its ownership to the customer.
- (viii) DTH operators do not offer free to air channels unless the user pays monthly subscription. This is against the government rules.
- (ix) Some DTH operators charge Rs. 100/- or so per month, for the period that the user does not recharge the service.

- (x) A sample survey of DTH users proves that there existed information asymmetry in the market. The customers are not aware of their rights, obligation and various schemes offered.
- (xi) The customer is made to sign an agreement with the DTH operator, in which the onerous conditions are printed in minute and illegible form.
- (xii) The practices of the DTH operators violate Sec 3(3) of the Competition Act.

7. After perusing the report, the Commission sought more information on following points

- (i) Functioning of the various hardware components,
- (ii) Findings on specific allegations by the informant,
- (iii) Terms of license agreement between the DTH operators and the government, and between DTH operators and the consumers,
- (iv) Role of the other regulators and action taken by them,
- (v) International practices.

8. Supplementary Report dt. 03/12/09

- (i) Despite stipulation to provide set top box of `open architecture (non proprietary)...ensure technical compatibility and effective interoperability among different DTH service providers....' in the license agreement, the DTH operators have hoodwinked it.
- (ii) The DTH operators have managed to scuttle the other way of interoperability (i.e. commercial interoperability) by not offering the customer to buy, rent or hire-purchase the equipment.
- (iii) Some DTH operators do not charge for the period the service is not availed, though they keep such conditions in the customer agreement.
- (iv) There appears to be no anti competitive agreement between the DTH operators and the STB manufacturers.
- (v) Since no DTH operator has dominance in the market, there is no abuse of dominance. Concept of collective dominance is not a concept in the Indian legal system.
- (vi) In US interoperability has been effected since 2007. Other developed countries are moving towards full interoperability.

9. After perusing the supplementary report, the Commission sought more information on tie-in as alleged by the informant

10. Supplementary Report dt. 25/01/2010

- (i) Dish TV is the only operator that mentions in its customer agreement that they can procure set top box from any source. The company however, keeps this option to the paper only.
- (ii) Videocon is the only operator that mentions the three options to procure set top box in its customer agreement.
- (iii) DTH operators sell their service with hardware tied-in. Also the hardware is manipulated to deny access to other DTH operators. To further enforce the tie in arrangement, DTH operators do not provide CAM + viewing card if a buyer does not buy set top box from it. This way interoperability is scuttled.

11. An opportunity was given to the informant i.e. Consumer Online Foundation to explain its case. The informant took a plea that certain procedural irregularities were committed by the Commission before giving an opportunity to the informant. It was argued that though technical interoperability has been mandated by the TRAI licence it was not given to the consumers by the DTH operators. It was also stated that commercial interoperability has been mandated by the TRAI under its DTH services (Standard Quality of Service and Redressal of Grievances) Regulations 2007 but in practice is not being offered to the consumers. It was also stated that unreasonable conditions have been placed on the consumers restricting the exit options of the consumers. It was also stated that the DTH operators have been forcing the consumers to get into a tie-in arrangement in order to have a subscription. An argument raised was that the DTH operators by not proposing to compete with each other and therefore because of this anti- competitive practice competition in the DTH market was affected. The informant relied on the findings of the DG that interoperability could be obtained in the market through conditional access modules (CAMs) if available in the market. It was stated that Dish TV had provided 481 CAMs to Kingfisher Airlines in 2007 and therefore it was possible to give CAMs to the consumers as and when they desired it. It has also been argued that technical interoperability was therefore possible. As far as commercial

interoperability is concerned, it was stated that a consumer had the option of outright purchase or hire purchase or rental basis for acquiring the DTH equipment. Before the DG it was argued that STBs were offered free of cost but it was found to be false because the consumers who opted for the services were offered the equipment on outright purchase basis. The informant then relied on the regulations in other jurisdictions which favoured interoperability. The informant relied on the regulations of the USA and Europe. According to the informant interoperability is being favoured in most of the countries. The informant then stated that all the DTH operators operate as a cartel in clear violation of section 3(1) of the Act. In the informant's view the DTH operators are acting in concert and they have taken measures to avoid competition among themselves. It was stated that action in concert is covered Section 2(b) of the Act. It was argued that the offence of the operators is clear from the fact that all of them have violated the terms of the licences issued to them. It was argued that the STBs and CAMs would have been made commercially available to the consumers which has not been done. It was further stated that the restrictive conditions exist in the customer agreement forms which ensure that only services of the operators can be used with the STBs provided by them. The information argued that the DTH service operators were not interested on poaching on each other's clients and they were all interested in their individual subscription base. The informant then relied on the decision in the following cases.

- (i) ICI vs. Commission (cases 48/69 etc. [1972] ECR 6/9, [1972] CMLR 557)
- (ii) Soda –ash/Solvay (OJ[1991] I 152 / 1)

The gist of both the cases is that collusion does not require for the making of a formal agreement. It was stated that conduct of each of the parties have to be examined. It was stated that in India all the DTH operators operate as a cartel without the need of any actual communication. Another argument was taken that the DTH operators had not submitted copies of the agreements with the STBs suppliers and failure to do so in compliance of DG's directions should lead to the levy of penalty on the DTH operators. It was stated that due to anti-competitive behaviour of the DTH operators, it has led to complete elimination of competition in the market for STBs and for these reasons the existing STB manufacturers or potential manufacturers cannot sell their products in the open market. It was argued that the entire market for STBs has been eliminated to the detriment of subscribers. It was

stated that the STB market should be opened for the STB manufacturers. It was further argued that there was an abuse of dominance under section 4(1) of the Act by the DTH operators and that the concept of collective dominance existed in law. It was stated that if this was not done then the law would become impotent against instances of abuse by multiple unrelated entities. Reliance was then placed on Section 4(2) of the Act and it was argued that the dominance means the power to fix the market prices, output, innovation, variety of goods and services or other parameters of competition in the market. It was stated that all the DTH operators have locked in their consumers and that switching from one DTH operator to another was not possible. The informant then relied on the decision of United Brands vs. Commission and Hoffmann-La Roche vs. Commission. It was argued that dominance was not a factor of market share. It was factor of ability of an undertaking to hamper effective competition and affect the ultimate consumer in its favours in the relevant market. It was, therefore, stated that each DTH operator was affecting competition in the relevant market by preventing both technical and commercial interoperability. It was argued that each operator enjoys a position of strength. It affects the consumers and leads to the collective anti competitive arrangement. It was further stated that if an operator sells STBs on subsidised rates it would amount to predatory pricing. It was stated that providing technical interoperability would give freedom of choice to the consumers and technical interoperability would provide better choice to the consumers. It was also argued that none of the operators offered all the three options of outright purchase, hire purchase and rent of STBs to the consumers. If commercial interoperability had been offered the adverse effect on competition would have been partially addressed. It was argued that if the option of taking STB on rent had been given, it would have been much easier for the consumers to move from one DTH operator to another. The freedom to move to other service provider could have been due to inadequacy of service or better offers by the other operators. It was therefore, stated that the operators have indulged in cartelisation in clear violation of section 3(1) of the Act. It also stated that conclusion of the DG that operators have open architecture in the STBs which is not backed by any expert opinion was incorrect. It was argued that the STBs available in the market have proprietary architecture making them non-interoperable. It was further strengthened by the fact that the CAMs were not offered by the operators. It was also stated that there is information asymmetry in this case

and none of the operators provided interoperability options to the consumers. The informant therefore argued that the following directions should be issued by the Commission.

- a. Direct the Respondents to discontinue their anti-competitive practices.
- b. Direct Respondents to abide by their licensing agreements and ensure both technical and commercial interoperability.
- c. Direct Respondents to offer CAMs in the market to make the interoperability effective and meaningful.
- d. Since the existing subscribers have suffered enormously on account of the anti-competitive activities of the Respondents, they should be directed to replace the existing STBs with technically interoperable STBs, as is the specific mandate of the licensing agreement.
- e. Impose stiff penalties on the Respondents for acting in concert and indulging in cartelisation.
- f. Direct the Respondents to appropriately communicate the directions of the Hon'ble Commission to all the subscribers through effective means of communication.
- g. Pass any other order that the Hon'ble Commission deems fit in the interest of justice and fair play.
- h. Direct the Secretary to refund the amount of Rs.50,000 deposited as the fee for filing the information as the Report of the DG has found the information to be substantive.

12. Before proceeding further it is necessary to examine the guidelines of the sectoral operator i.e. TRAI and the licensing conditions of the Ministry of Information and Broadcasting. On interoperability TRAI vide its orders dated 30.01.2008 opined as follows-

- (a) It is seen that in the present state of DTH market in the country, technical interoperability has not taken deep roots. The main reason for this is the unavailability of Conditional Access Modules (CAM) of different DTH service providers. The BIS specifications for DTH set top boxes require each set top box to have a Common Interface (CI) slot for the purposes of technical interoperability. Technical interoperability is achieved by plugging in the CAM of new DTH operator in the CI slot of set top box provided by the existing DTH

operator. For example, a subscriber of DTH operator 'A' who wishes to switch over to DTH operator 'B' has to procure a CAM from 'B' and plug and CAM into the CI slot of the set top box supplied by 'A'. This enables the subscriber to start receiving the services of 'B' using the existing set top box and dish antenna (although the dish antenna has to be re-aligned towards the satellite being used by 'B'. As of now the Conditional Access Modules (CAM) are not being supplied by the DTH operators as the Conditional Access Modules (CAM) presently cost almost as much as a new set top box. Therefore, technical interoperability has not been very successful. However, it is expected that the new DTH service providers, who may be interested in taking over the DTH subscribers of existing DTH operators, will start making available conditional Access Modules (CAM). Moreover, presently the DTH market is at a nascent stage with a small subscriber base. With a small subscriber base, the churn or shift from one service provider to another is going to be even smaller. Therefore, the demand for Conditional Access Modules (CAM) is also very limited. Once, the subscriber base of DTH grows and the churn becomes substantial, the demand for Conditional Access Modules (CAM) will also increase and it is expected that increase in volumes will result in drastic fall in prices of Conditional Access Module (CAM). Hence, it is essential to ensure that all the set top boxes have the CI slot mandated by the BIS specifications in order to benefit from the technical interoperability in near future.

(b) The views of the Ministry of I&B on some of the issues are as under:-

“There are already two DTH operators who are operational and are using the MPEG 2 compression format as per the present BIS specification provided for the same. The new operators like Sun TV Direct Pvt. Ltd., Reliance Blue Magic Ltd., and Bharati Telemedia Ltd. are wanting to go on the MPEG 4 compression format and it has been said that it offers substantial video quality improvements over current compression format and with over 25% savings in the transmission bandwidth.”

(c) The Ministry of Information & Broadcasting convened a meeting with the representatives of BECIL, Prasar Bharati and Bureau of Indian Standards on the issue of technical interoperability and in this connection Para 4 of the letter of Ministry of I&B is reproduced as below

“A meeting was held in the Ministry with the representatives of BECIL, Prasar Bharati and Bureau of Indian Standards on the issues of technical interoperability. It was suggested in the meeting that the guidelines be modified to incorporate the commercial interoperability of set top boxes for the following reason:

- (i) the interoperability between set top boxes between two DTH operators is practically not feasible to the level of completeness.
- (ii) the imposition of this clause of interoperability increases the cost of set top boxes which the consumer has to bear
- (iii) the strict adherence to BIS specifications of set top boxes inhibits the advent and advancement of technology and the resulting benefit to the consumer.”

(d) After consulting the different stakeholders TRAI recommended to Ministry of I&B to amend the licensing conditions and the recommendations are as under:-

“The open Architecture (non-proprietary) Set Top Box, should be such as to ensure technical compatibility and effective interoperability among different DTH service providers. The DTH Set Top Boxes supplied to the subscribers shall have such specifications as laid down or as revised by the Government from time to time. However, in cases of revision of specifications such revisions will be applicable prospective to new subscribers, and the licensee will have a transition period of six months from the date of such revision to ensure full compliance with the revised specifications for the new subscribers.”

(e) The Commission also wrote a letter dated 05.07.2010 to the Ministry of I&B regarding technical and commercial interoperability and the Ministry gave a reply on 27.09.2010 which reads as follows:-

“.....With passage of time, different technologies and standards have evolved (MPEG-2, 4/DVB-S, DVB-S2) for signal compression and transmission. For this and various other reasons the Ministry, therefore, requested TRAI to examine the issue of interoperability afresh and submit its recommendations to the Ministry. TRAI forwarded its recommendations on interoperability and other issues relating to DTH recommendations to the Ministry on 30th January, 2008. The recommendations were discussed

with various stakeholders in the Ministry and it was felt that for a number of reasons the recommendations of TRAI need to be further examined by TRAI. Accordingly, Ministry has referred the matter to TRAI for re-examination. TRAI has since floated a consultation paper on 20th August, 2010 which is available on their website. The Ministry is awaiting the recommendations of TRAI before firming up a view on whether the requirement of technical compatibility and effective interoperability among different DTH service providers needs to be continued with as it is, or in a modified form or should be dispensed with entirely...”

13. It is now necessary to examine the contentions raised by the DTH operators. It has been argued that the market was very competitive and the market was growing at a very fast pace and that the operators were not pursuing any anticompetitive practice. This is an issue which the Commission has to consider after considering the findings in DG’s report and the contentions of the operators.

14. Another argument raised was that there was no market for a standalone Conditional Access Module (CAM). Further, it was stated that TRAI had accepted that technical interoperability was not possible because the CAM costs are the same as that of the setup box. These arguments are not correct. The DTH operators have not tried to develop a market for standalone sale of CAMs because they all developed a business model where for the DTH services the customers had to buy the DTH hardware from the operators. As far as the cost of the CAMs are concerned because the CAMs were not sold separately by the DTH operators in the market, the price discovery of the CAMs was not possible. No material has been brought on record as to how the costing of the CAMs has been arrived at.

15. The third argument which has been raised is about tie-in sales. It was argued that there was no tie-in because no one was forced to buy any product. Further it was stated that the D.G. in his report has not mentioned as to what equipments were tied-in and further, D.G. had failed to mention the specific clause of Section 3(4) under which the tie-in occurs. It was also stated that the Commission had prejudiced the D.G. by directing that the D.G. should conduct an enquiry under Section 3(4)(a)

of the Act. It was also argued that in the absence of agreement of tie-in the violation of Section 3(4) was not established.

The facts are that an agreement existed between the consumer and the DTH operator. There may be a view that as no agreement existed between the operators, Section 3(4) of the Act does not come in play. There is nothing in Section 3 of the Competition Act which states that the consumers' agreements cannot be considered under Section 3 of the Act. Further it may be argued that a consumer is not part of a production chain in Section 3(4) of the Act. This view is also erroneous as the subject matter of the Competition Act is the consumer and the consumer is the end of the production chain. The Commission has not prejudiced the minds of the D.G. to look into the provisions of Section 3(4) of the Act. DG's role is that of a fact finding authority. If the D.G. does not consider the existence of tied-in products, it is for the Commission to look and examine this aspect. The Commission gets assistance from the D.G. and it is the duty of the Commission to look into all the aspects and pass a proper and judicial order.

16. The fourth argument which has been raised was that the consumer benefits by the tie-in because the setup box was supplied free or at subsidized rate. First, the concerned operator i.e. Tata Sky has accepted that tie-in exists. Further as the operators supply the CAM with the setup box, as the setup box was not available in the market the true price of the setup box was not known. Further, as the CAM is priced at a high level, the subsidy if it exists is recovered with the price of the CAM.

17. The fifth argument was that the D.G. has not mentioned the clauses of Section 19(3) which were attracted in this case. Under the provisions of Section 19 of the Act, it is not necessary for D.G. to deal with Section 19(3) of the Act. In fact it is mandatory for the Commission to examine the clauses of Section 19(3) of the Act while passing an order or giving a direction of the D.G.

18. The sixth argument advanced was that as no agreement existed between the DTH operator and the STB manufacturer Section 3 could not be involved. The D.G. in his report has not looked into this aspect. Though this was one of the allegations, it is not the main allegation and may be looked into separately.

19. The seventh argument is that interoperability was irrelevant due to technological advancements. It was stated that some DTH operators were using the MPEG-2 format whereas others were using MPEG-4 format and for this reason interoperability was not possible. This argument is partially correct.

20. The eighth argument which was advanced is that the DTH market was a nascent market and no operator is a big player so as to resort to tie-in arrangement. It was also argued that tie-in helps as large volume of STBs can be purchased by the operators at a low cost which helps the consumers. It was also argued that interoperability is irrelevant as the STBs are given on rent or are free. It was argued that for this reason there was no exit barrier. The arguments raised are to the extent that tie-in has been accepted. Large purchases of STBs are made at lower prices but there is no material to hold that the lower prices are passed on to the consumers. Further, the market is not small though it may be a new market. There are 30 million subscribers and the figures of 30 million is much bigger than the population of many countries in the world. As far as the exit barrier is concerned, in some cases the equipment is sold on outright sale basis whereas in some cases it is given on rent. A similar model is not followed by all the operators. But the consumers are of the view that they had purchased the equipment. This is on the basis of the sample survey carried out by the D.G. Thus, there is an exit barrier.

21. The ninth argument advanced is that the consumer is aware of the switching costs when he shifts from one operator to another. It is a settled proposition in competition that switching should be as painless as possible i.e. switching costs be reduced. This would increase competition in the market which in turn would increase innovation, productivity, efficiency and lead to greater consumer satisfaction.

22. The tenth argument advanced was that this issue should be referred to TRAI, B.I.S. and the ministry as the operators are complying with all the regulations. A reference was made to the authorities and their replies have been noted. But the issue of competition in the market does not fall within the domain of TRAI, BIS or the government and has got to be considered by the Commission.

23. The eleventh argument advanced is that as TRAI considers DTH, cable, IPTV and HITS as substitutable service, the Commission should treat them similarly. It was argued that as the D.G. had not identified the market, his findings were flawed. This argument is not correct because the D.G. has identified the market. Further even if the D.G. had not identified the market, it was the duty of the Commission to identify the market while dealing with this case.

24. The twelfth issue raised by Bharati Telemedia Ltd. was about the setup boxes and CAMs. It was argued that each setup box (STB) is customised to a particular DTH service provider. It was also argued that as STB is a part of DTH service, no tie in was involved. It was stated that the STB and DTH signals were not two distinct products and that there was no independent demand for STB. It was further argued that tie-in was necessary to attract customers and make them shift from Cable TV. It was also stated that if the operators are forced to sell CAMs, no new DTH operators will enter the business. It was also contended that the current economic conditions did not require independent sale of STBs. In the consequence the alleged tie-in did not cause any anticompetitive effect. These contentions raised will be discussed separately.

25. The thirteenth issue, which has been raised by Bharati Telemedia Ltd. Is that free to air channels should not be considered a part of the market. In the same vein, Reliance Big TV has argued that all DTH operators charge for free to air channels because they had incurred capital cost for the provision of the services. It was therefore clear that there was an anticompetitive element while in charging for the free to air channels. This issue would be considered later in this order.

26. The fourteenth issue raised by Reliance Big TV was that the TRAI regulations permitted charging of fees from the consumer for the period the DTH service was not availed off. It was argued that bundling of channels was a scheme which an operator was entitled to have. If charges are for services not availed is not anti-consumer and anticompetitive, I do not know what should be treated as anticompetitive. In the market, such types of abuses have to be suffered by captured consumers. Further bundling of channels is also an abuse suffered by the captured customers.

27. Dist TV has challenged the jurisdiction of the CCI. It has also been stated that similar issues have been raised by the Tamilnadu Progressive Consumer Center and the matter is pending before TDSAT. It was argued that Dish TV provides commercial interoperability as mandated by TRAI. In continuation of this argument it was stated that Dish TV permitted the purchase of STB from any source and that it would be selling CAMs in the open market. There is no doubt that TRAI is the sector regulator for the market. But competition in the market falls within the exclusive jurisdiction of the Competition Commission and for this reason the arguments raised by Dish TV are not correct. The Commission has full jurisdiction over competition in the relevant market.

28. Bharat Business Channel (Videocon d2h) argued that it had achieved both technical and commercial interoperability and that has it had only 3% of the DTH market it was not dominant and it is not engaged in any tie in arrangement. It was also stated that its STB, unlike others can be used with any other DTH service provided CAM is provided. It was stated that it gives options to consumers to take the equipment for the DTH service on outright purchase, rent or hire purchase. It was mentioned that it was not obligatory for a consumer to buy STB from it and they could also subscribe to the services of other DTH operators. It was argued that the complaint was not against it but the D.G. had included its name. It was also stated that it had not indulged in any tie-in arrangement. The issues raise where would be considered separately.

29. Sun Direct TV Pvt. Ltd. Has argued that it had only 5% of the market and was therefore not dominant. It was stated that its STB has a slot for another operator's CAM but before taking the CAM from another operator the consumer had to get an authorisation from it so as to restrict piracy. It was further argued that consumer satisfaction would suffer if the STBs were made interoperable as each operator had specific features.

30. In the light of the information filed against the four DTH operators, the licensing arrangement of DTH services by the Ministry of Information and Broadcasting, TRAI regulations, the three reports of the Director General and the

submission of DTH operators, the issues raised have to be decided. But before taking up the issues raised it is necessary to examine the history and the working of the market.

31. When the television was invented by Baird, the issue was to get the data or the software which could be seen on the television. Long distance broadcast became possible only when communication satellites were introduced for the first time in 1962. The programme was compressed in signals and sent to the satellites which then through the transponders beamed them back to the earth. Earlier, the signals from the satellite were taken by the earth stations which then relayed the signals and they were received by the customers through their antenna. Subsequently, due to technological changes operators started receiving them on proprietary dish antenna and through cables supplied to the consumers. The technology was analogue as the TVs which were used were also analogue. The signals transmitted in digital form is more efficient. In analogue signal service, approx. 80 channels can be viewed whereas in the digital format one can see much more than 80 channels. Most of the TVs used in India use the analogue technology, Cable TV became popular in India around 1990. Subsequently the Multi Service operators entered the scene. They brought in better equipment and started giving the signal feed through cables to the cable operators who in turn gave the signals to the consumers. In India, a system of pay channels was introduced as in other countries. In the consequence the subscription paid by the consumers was increased. The government then introduced a system of Conditional Access Modules (CAMs) even for cable T.V. in 2005-06. Under this scheme, there was to be no charge for free to air channels whereas the consumer would choose the pay channels which he wanted to see and for which he was willing to pay. Licenses given to the operators by the Ministry of Information and Broadcasting and the regulation of the operators was to be carried out by TRAI. Around the same time, satellite T.V. made its appearance in India. The licensing was again with the Ministry of I&B and the regulator was TRAI. In the satellite T.V., the signals from the satellite transponders were received directly by a dish antenna at the premises of the consumer. The signal in the antenna was then transferred to a setup box which had a viewing card and a conditional access module (CAMs). The viewing card is the key to the CAM and the control of the operation is through this card. The CAM

receives the feed from the antenna which is in digital form and converts it to analogue form and then the signal is fed into the T.V. The quality of viewing in satellite T.V. is high quality and cheaper because cables are hardly used. It can also be used in areas where Cable TV is not available. During this period, the number of T.V. channels increased exponentially. In India, 457 channels have been authorised to operate. T.V. feed is now available on computer monitors. After the advent of 3G & 4G telephony T.V. feed is now available even on mobile phones.

32. As far as satellite T.V. is concerned because of the good signal quality and flexibility, it has grown very fast. Though it was introduced in India 5-6 years ago, there are over 30 million subscribers now. The first to introduce satellite T.V. was the government itself through DD Direct and it has mainly free to air channels. Among the private operators, Dish T.V. was the first one to start operations and it was followed by Tata Sky. These two operators use a system which is MPEG-2 format. Four more operators then entered the business and they are Reliance Big T.V., Airtel T.V., Sun Direct and Videocon d2H. These four use MPEG-4 format of transmission.

33. The market leaders are Dish TV and Tata Sky. Sun direct T.V. is catching them in the number of subscribers because it is very aggressive and claims that it is giving the hardware consisting of the antenna, setup box and the CAM card free. MPEG-4 format is better than MPEG-2 format because the signal quality is better and it uses a smaller bandwidth. If all the six operators were using MPEG-4 format it would have been better as there would have been uniformity and easier interoperability. On the MPEG-4 equipment, signals of MPEG-2 format can be received but the converse is not true. Now if Tata Sky and Dish TV change the equipment and shift to MPEG-4 format it would involve great cost and would be to the detriment of the consumers. But even if they use the MPEG-2 format for transmission, if MPEG-4 equipment is given to the consumers, they can receive them on their television. It is thus clear that the use of different technology by the different operators leads to the lack of interoperability on the technical side.

34. In India, when Dish TV and Tata Sky started the DTH services, there were no suppliers of antenna, setup boxes, viewing card & CAMs. These two companies

started supplying these equipments. TRAI had mandated that a consumer could take the equipment from the DTH operators on outright purchase, rental or hire purchase basis. But the option is not explained by the DTH operators to the consumers. The agreement form submitted by the operators have such a small font that the consumers are not aware that three options are available to him. The four other operators i.e. Sun T.V., Reliance Big TV, Airtel TV and Videocon have followed a similar practice. Sun TV and Airtel TV stated before the DG that they do not charge any amount for the equipment. Reliance Big TV and Videocon TV give the equipment on rental basis. But the fact is that all these six operators have followed the same practice of supplying the DTH equipment to the consumers. As a consequence no separate market for DTH equipment has been created in India. On the other hand the DG got a sample survey carried out and his findings are that the consumers who took the services of the DTH operators were of the belief that they had purchased the equipment. All the DTH operators except Tata Sky have a clause in the agreement which states that the DTH equipment given to the consumer is the property of the operators. In the case of Tata Sky, the agreement form mentions that though there was a sale of the equipment the smart card and the CAM are the property of the operator.

35. At present, if a consumer wants to switch from one DTH operator to another, he would have to take a new antenna, a new setup box, a new CAM and a new viewing card. This would involve making fresh payment for all these items whereas the earlier equipment would become redundant. The earlier operator would take away the CAM and the smart card. An ideal situation would have been where the earlier operator would have taken the CAM and the smart card and the new operator would have placed its own CAM and smart card in the interoperable STB. The new operator would have changed the alignment of the antenna so that it faced its transponder. This would have made more economic sense and would have been cheaper for the consumer and interoperability would have been achieved. By following this model, switching from one operator to another would have been easier and less costly. But the DTH operators have bundled up their services with the DTH equipment supplied by them. There is no doubt that the DTH operators may have supplied the equipment at a discounted rate to the consumers. But by this process the DTH operators have stifled the growth of DTH equipment manufacturers. In the

consequence the DTH equipment such as interoperable STB and antennae are hardly available in the market.

36. Another issue which has arisen in this case is the bundling of services. There are free and pay channels. These DTH operators have bundled up the free and the pay channels. A consumer who has purchased the equipment would not get the services of the free channels if the subscription to the DTH operator has not been paid. This happens because the free to air channels have been bundled up with the pay channels. Even in the cases where the equipment has been taken on rent, the consumer loses the receipt of free to air channels if the subscription is not paid.

37. In the background of these facts, the competition issues which arise have to be identified. The D.G. has made out a case of violation of Section 3(3)(b) of the Competition Act. The D.G. has opined that no operator is dominant in the DTH market and that there was no concept of collective dominance under the Competition Act. The D.G. in his three reports has held that tie-in arrangements exist because there is no DTH equipment manufacturer who supplies the equipment in the open market. In the D.G.'s opinion if the DTH operators sold their CAMs in the open market, interoperability would have been achieved. D.G. has not examined the concept of switching in the market. The DTH operators have further stated that the D.G. has not identified the relevant market in this case.

38. It is therefore, necessary to deal with the provisions of Section 3 and 4 in this case as well as the relevant market. Relevant market in the Competition Act has been defined under Section 2(r) as follows:- “relevant market” means the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets. Therefore the relevant market has to be determined by the Commission in a judicial and justifiable manner. The relevant market has to be demarcated with reference to the relevant product market or the relevant geographic market or with reference to both the markets. The rigours of the Section would be fulfilled if the relevance of one of the markets is considered. It is necessary to examine the provisions defining the relevant geographic market and the relevant market. Section 2(s) defines the relevant geographic market and it reads as follows:-

Relevant geographic market means a market comprising the area in which the conditions of competition for the supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas. It thus clear that under the relevant geographic market what is required to be seen are (i) the conditions of Competition and (ii) homogeneity of the services or the demand of goods as compared to the neighbouring areas. The relevant product market is defined in Section 2(t) of the Competition Act and it reads as follows – relevant product market means a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer by the reason of the characteristics of the products or services, their prices or intended use. This section therefore talks of goods or services which can be interchanged or substituted in the eyes of the consumer with reference to prices, use and characteristics.

39. In this particular case it has been argued that cable T.V., IPTV and DTH services are the same product market as they can be substituted or are interchangeable. But when the arguments were made the three aspects to be examined were not done i.e. characteristics, prices and intended use. IPTV comes through the internet protocol i.e. the medium of broadcast is totally different. As far as cable TV is concerned, the medium is the cable and the services of a Multi Service operators is being used. In DTH T.V. the signal is received directly from the satellite and no other medium exists in between. Though the intended use of the services are the same, the prices of the three services are different. In fact DTH services is costlier than IPTV and cable TV. Even the characteristics are different. Even the consumer regards it as a service distinct from IPTV and Cable T.V. The central idea in Section 2(t) is for the consumer to realise that the services are substitutable or interchangeable. The consumer in India do not regard DTH TV as substitutable or interchangeable with IPTV and Cable T.V. Further IPTV and Cable T.V. cannot be seen in places where there is lack of broadband and cables. Further Cable T.V. is leads to lesser consumer satisfaction as limited channels are available. On the other hand nearly 1000 channels can be seen on DTH. Considering all these facts and the better image quality in DTH T.V., DTH service market is a different market as compared to IPTV and Cable T.V.

40. Thus, D.T.H. services constitute a separate relevant product market and DTH TV is a satellite T.V., its relevant geographic market is whole of India. On the other hand, a cable T.V. operator has a very small area to service. Thus, while a DTH operator can serve the entire length and breadth of India, a cable operator can serve only a small area in India. For this licensing of DTH operator is different from that of cable T.V.

41. In this connection, it is relevant to note that the DTH market is growing at a very fast pace. Because of better efficiency, wider choice of channels and increase in the disposable income of the citizens of India, subscribers are shifting from Cable T.V. to DTH T.V. In the consequence of this shift in the last one year, 15 million subscribers have been shifted from Cable T.V. to DTH T.V. Further, in areas where there was no cable T.V. DTH T.V. has made its appearance. It has resulted in greater consumer satisfaction.

42. It is necessary to examine the concept of enterprise, person and practice in the Competition Act Enterprise has been defined in the Act in Section 2(h)

“enterprise means a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.”

Activity has been defined in the explanation to Section 2(h) and it is an inclusive definition. The definition is not exhaustive and therefore a wide meaning to activity has to be given so that many elements in Section 2(h) do not become otiose. Section 2(l) has defined person as under

“person includes:- (i) an Individual; (ii) a Hindu undivided family; (iii) a company; (iv) a firm; (v) an association of persons or a body of individuals, whether incorporated or not, in India or outside India; (vi) any corporation established by or under any Central, State or Provincial Act or a Government company as defined in Section 617 of the Companies Act, 1956; (vii) anybody corporate incorporated by or under the laws of a country outside India; (viii) a co-operative society registered under any law relating to cooperative societies; (ix) a local authority; (x) every artificial juridical person, not falling within any of the preceding sub-clauses;”

Thus in many cases where a body of individuals act in concert, they can be brought together under the concept of “body of individuals” and would constitute a person under Section 2(l) and therefore an enterprise under 2(h) of the Act.

Practice is defined in Section 2(m) of the Act as follows-

“Practice” includes any practice relating to the carrying on of any trade by a person or an enterprise.”

43. In this case, we have to consider the concept of ‘switching’ when a consumer takes the services from a DTH operator, he enters into an agreement with the operator. The operator provides the hardware in the form of antenna, setup box, CAM and viewing card tied-in with the software which is in the form of TV signal feed. According to TRAI regulations, the operator has to give an option to the consumer to purchase the hardware on purchase basis or on rent or hire purchase. But at the time of the agreement, the conditions are given in such small font that it cannot be read. Further, the consumer is not made aware of the conditions and the entire exercise suffers from information asymmetry. Now, once the consumer has signed the agreement he is captured by the operator. It has been found at the time of investigation through the same survey that most of the consumers who have paid for the services are under the impression that they have purchased the hardware. But when this consumer shifts to another DTH operator he has to pay again for the dish antenna, STB, CAM Card and the viewing card. This amounts to a capture of the consumer as the switching costs are high. Further it does not make economic sense to buy a new antenna as the old one could have worked by changing the alignment of the dish antenna. It does not make any sense in changing the STB as the same STB could have been used by changing the CAM and viewing card. Thus

not only switching costs are high, there is information asymmetry but there is a wastage of resources in the form of new STB box and antenna.

44. If the switching costs are low, then a consumer could shift to a DTH operator who was more efficient, innovative and cheaper. By having high switching costs, a new entrant in the DTH market would not be able to get customers as the consumers of the DTH operators who were in the market would not be able to switch. It is a settled proposition that high switching costs are a symptom of anti competitive behaviour. Thus, the agreements between the consumers and the DTH operators have got to be examined with reference to the provisions of Section 19(3) of the Act.

45. By having high switching costs, as a new entrant in the business of DTH operations would not be able to get customers from the operators who were in the field earlier, a barrier to the new entrants in the market has been created. There is also a foreclosure of competition by hindering entry into the market. Further by having switching costs, there is no accrual of benefits to the consumers. In the long run if someone comes with better technology in the DTH market, because of high switching costs, there would be an impediment to the operator with better technology. In the DTH market, MPEG-4 technology is better than MPEG-2 technology because of use of lesser bandwidth and better pictures, but the consumers cannot shift because of the high switching costs. Therefore the conditions in clauses (a), (c), (d), and (f) in Section 19(3) are fulfilled and therefore the agreements between the consumers and the DTH operators create an adverse effect on competition in India. These agreements are violative of Section 3(1) of the Act and are void under Section 3(2) of the Act.

46. The next issue to be decided is whether the provisions of Section 3(3)(b) are applicable in this case. The finding of the D.G. is that the practice followed by the six DTH operators are hit by the provisions of Section 3(3)(b) of the Act. The facts of the case are that the Ministry of Information and Broadcasting issued licenses to the DTH operators for giving the feed of T.V. signals which are beamed from the transponders of different satellite. In the licenses issued by the Ministry it was envisaged that there would be technical and commercial interoperability between the DTH operators. The first two DTH operators were Dish TV and Tata Sky and they

still remain the market leaders. They started a practice according to which a customer had to buy the DTH hardware consisting of dish antenna, setup box, CAM Card and the viewing card. Thus the hardware was tied up with the software which was the T.V. signal feed. The consumer was not given the choice of buying the dish antenna, setup box, CAM Card and the viewing card from the market. There is no doubt that the CAM Card and the viewing card specific to a DTH operator and could not be sold in the open market. But the consumer should have been given the option to buy the dish antenna and the setup from the market. An argument could be given that setup box and the antenna were not available in the market and for this reason, the DTH operators were supplying the equipment. This could have been correct in the initial stages but the market for hardware could have developed at a later stage. But the market did not develop because the four later DTH operators followed the practice followed by the two market leaders. The entire DTH equipment is supplied by the DTH operator and the consumer cannot buy them from the market. Even if a consumer is able to buy, the DTH operator would not use them for its service. In the consequence, the market for the supply of DTH hardware to the consumers did not develop. The entire supply of such hardware remained in the hands of the DTH operators and the manufacturing market of these items did not develop in India. Further, the DTH operators gave scant respect to the interoperability clause in the licenses issued to them and got the setup boxes designed suited only for their CAMs. Before the D.G. also they did not submit their agreements with the STB manufacturers. Thus the DTH operators followed a tied-in business model which did not allow the growth industry for DTH hardware and also defeated the concept of interoperability.

47. Now Section 3(3) of the Act reads as under:-

“Any agreement entered into between enterprises or associations of enterprises or persons or association of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which –

(a) directly or indirectly determines purchase or sale prices;

(b) limits or controls production, supply, markets, technical development, investment or provision of services;

(c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;

(d) directly or indirectly results in bid rigging or collusive bidding.”

Under this section, an agreement entered into by enterprises, persons and association of persons or a practice carried on or a decision taken by AoP, enterprises and person including cartels, engaged in identical trade of goods or the provisions of services would be presumed to have an appreciable adverse effect on competition provided clauses (a) to (d) mentioned above are satisfied.

48. In this particular case, as already discussed above the practice followed by the DTH operators had not allowed the market of DTH hardware to develop. Thus the conditions laid down in clause (b) are satisfied. By following the business model each DTH operator is happy with its customers and is not willing to take the customers of any other DTH operator. Thus there is hardly any competition in the DTH market and the market is shared. Thus clause (c) of Section 3(3) is also brought in play. The finding of the D.G. regarding the violation of Section 3(3) of the Act is therefore established.

49. Even if the violation of Section 3(3) of the Act is established it is only a rebuttable presumption. It was for the DTH operators to bring on record material and establish that the presumption was not warranted. No such material has been brought on record to defeat the presumption of Section 3(3) of the Act.

50. But it is mandatory for the Commission to examine the conditions in Section 19(3) of the Act. Clause (c) of Section 19(3) is attracted in this case because there is a foreclosure of competition in the market by hindering the entry of DTH hardware manufacturers in the market. The business model also works as a barrier to entry in DTH hardware market. Clause (a) of Section 19(3) is therefore attracted. Even clause (f) of Section 19(3) also comes into play as economic development by means of production is stifled. Considering these clauses, violation of Section 3(3)(b) is clearly attracted.

51. The next issue to be examined is as to whether tie-in exists in terms of Section 3(4) of the Act. Section 3(4) of the Act reads as under

“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.”

The section talks of an agreement amongst enterprises or persons at different stages/levels of production chain in different markets in respect of production... or provision of services. One objection that can be raised is that a consumer is not covered in this definition. This view is erroneous because person mentioned in the Section includes both the service provider and the service taker in accordance with Section 2(l) of the Act. In this particular case, there is an agreement, the service provider is the DTH operator and the service taker is the consumer. The production chain, level and stage of production are only in respect of agreements where manufacturers and consumers as well as enterprises are involved. This is a case of the provision of services and therefore the concept of production chain/level of production does not come into operation. Tie-in arrangement comes into play under Section 3(4)(a) of the Act. Tie-in arrangement comes into play when some goods are required to be purchased in addition to be purchased in addition to the purchase of the primary goods. But Section 3(4) would come into play only when there is appreciable adverse effect on competition.

52. During the course of hearing, Bharati Telemedia Ltd. (Airtel) and Tata Sky admitted that tie-in exists. In the case of Airtel it was argued that each setup box was customised to a DTH service operator. It was also stated that the setup box and DTH signals were not two distinct products and were part of the DTH service. It was also argued that if the operators were forced to sell CAMs,, no new DTH operator would enter this business. It was stated that current situation did not require the independent sale of setup boxes. In the case of Tata Sky the argument taken was that the market was nascent and small and therefore the setup boxes were supplied to the consumers free. It was also argued that when large purchases of setup boxes are made, economy of scale is achieved and because of this saving setup boxes were given free to the consumers. On the other hand the D.G. in his report has accepted that tie-in exists but it exists for the reason that DTH hardware was not available in the market.

53. The facts found by the D.G. and admitted by some of the DTH operators is that tie-in exists. When a consumer approaches for the feed of T.V. signals, the operator asks him to take the DTH hardware from it or the T.V. feed is not given. This has led to the fact that no market exists where a consumer can buy setup box which is interoperable and in whose slot the CAM of any operator can be fixed. Further it has been argued that the setup box cannot be separated from the DTH service and that it was a part of the same service. This amounts to saying that electricity and wire in which the electricity is carried are the same product. The operators have got the DTH customised with their service and CAM in complete violation of the licensing arrangement. Further the tie-in violates clauses (a), (c) and (f) of Section 19(3) of the Act as discussed earlier primarily because by the tie-in arrangement the market and manufacture of the DTH hardware did not develop in India. Thus, there is an appreciable adverse effect to competition in India due to the tie in arrangement.

54. The last issue to be decided in this case is that of abuse of dominance under Section 4(1) of the Competition Act. The allegations have been made by the informant about the abuse of dominance. But the D.G. did not examine this issue because according to him, the concept of collective dominance does not exist in the Competition Act, 2002. The DG has not given any findings on the abuse of

dominance though he has mentioned some of the abuses in his report. As already discussed, enterprise has been defined in Section 2(h) of the Act and the definition includes a person as defined the Section 2(l) the Act. Person includes an association of person or body of individuals whether incorporated or not. In this case, there are six operators who follow the same business model in the DTH model and together control nearly 95% of share in the DTH market. Together these six companies would constitute an unincorporated association of persons and would be an enterprise for the purpose of Section 4(1) of the Competition Act. As already discussed the relevant market is the market for DTH services and the geographical market is whole of India. This enterprise has nearly 95% of the DTH market and the business model being followed which in turn creates captive consumers through high switching cost makes the DTH operators to operate independent of the competitive forces in the relevant market. This enterprise is affecting its consumers and is running the relevant market in its favour. This is evident form the fact that -

- (i) each consumer who goes to a member of this association has to buy the DTH hardware such as setup box and the antenna from them.
- (ii) each consumer who takes a connection from any of the members of this association gets a setup box which is not interoperable in violation of the licensing arrangement.
- (iii) If a consumer wants to shift from one operator to another, he has to buy the antenna and setup box again. This involves high switching cost.
- (iv) If a consumer wants to shift his connection from one place to another he has to incur costs which are higher than the original subscription cost.
- (v) The consumer has to pay for free to air channels which he is not required to pay for.
- (vi) In some cases, the consumer has to pay subscription even if the services are not available off.
- (vii) The free to air channels are bundled up with the pay channels so that the consumer is unable to see the free to air channels if the subscription for the pay channels are not paid.
- (viii) By their action, this association has restricted the production of DTH equipments as discussed above.

- (ix) By not switching to the supply of MPEG-4 format STBs for new customers, the enterprise has caused a prejudice to the consumers by not allowing the benefit of scientific development to the consumers.

In short, the enterprise i.e. the unincorporated A.O.P. has contravened the provisions of Section 4(2)(a)(i), 4(2)(b)(i), 4(2)(b)(ii) of the Act.

55. In the light of the facts of the case, the investigation report of the DG, replies of the parties and statutory provisions and the intent of the Competition Act is held that the DTH operators have contravened sections 3(1) with section 3(3)(b) and section 3(4)(a) along with section 4(2)(a)(i), 4(2)(b)(i) and 4(2)(b)(ii) of the Act. According to the scheme of the Act following orders are being passed under section 27 of the Act:

All the DTH operators are directed to:-

- (i) minimize the information asymmetry by clearly informing their customers that the STBs and other necessary hardware are available through the mode of outright purchase or on rental basis. This should be broadcasted on their websites and also on their DTH platforms.
- (ii) change the business model in such a way that customers should not be obliged to buy hardware from them and make their CAM available in the open market and also take measures that the market for the other hardware related with DTH grows independently so that concept of interoperability becomes a reality.
- (iii) provide free to air channels to the customers without bundling it with other channels and the choice should also be given to the customer to subscribe even one channels and the choice should also be given to the customer to subscribed even one channel along with the free to air channel with only nominal administrative cost.
- (iv) submit their compliance report to the Commission within 3 months of this order.

(R. Prasad)
Member, CCI