



## COMPETITION COMMISSION OF INDIA

Case No. 10 of 2023

**In Re:**

**Extreme Infocom Pvt. Ltd.**  
2<sup>nd</sup> Floor, B 5, KLJ Tower North,  
District Centre, NSP, Wazirpur,  
New Delhi 110034

**Informant**

**And**

**National Internet Exchange of India (NIXI)**  
9<sup>th</sup> Floor, B-Wing, Statesman House,  
148, Barakhamba Road  
New Delhi 110001

**Opposite Party**

**CORAM**

**Ms. Ravneet Kaur**  
Chairperson

**Mr. Anil Agrawal**  
Member

**Ms. Sweta Kakkad**  
Member

**Mr. Deepak Anurag**  
Member

**Present (during preliminary conference):**

**For Informant**

Mr. A.N. Haksar, Sr. Advocate  
Mr. Saurabh S. Sinha, Advocate  
Mr. Chitra Y. Parande, Advocate  
Mr. Raunaq Maheshwari, Executive Director

**For Opposite Party**

Mr. Vaibhav Gaggar, Advocate  
Mr. Ashok Kumar, Advocate  
Ms. Kokila Kumar, Advocate  
Ms. Chhavi Arora, Advocate  
Ms. Shefali Munde, Advocate  
Mr. Shubham Sharan, General Manager  
Ms. C. Jayakiran, Law Officer  
Mr. Soumen Bhowmik, Manager



## Order under Section 26(2) of the Competition Act, 2002

1. The present Information has been filed by Extreme Infocom Pvt Ltd. (**‘Informant’**) under Section 19(1)(a) of the Competition Act, 2002 (**‘Act’**), alleging contravention of the provisions of Section 4(2)(a)(ii) and 4(2)(c) of the Act by National Internet Exchange of India (**‘NIXI/OP’**).

### *Facts and allegations, as stated in the Information*

2. It is stated that the Informant, having its registered office in Delhi, is a company registered under the provisions of the Companies Act, 2013. It is engaged in the business of providing internet exchange services to customers through its trade name *Extreme IX*. The Informant provides Internet Exchange Points (IXP) connecting Internet Service Providers (ISPs) and local and international content providers/ Content Delivery Networks (CDNs) (known as peering). The IXP provides physical infrastructure and facilitates physical aggregation for many one-to-one peering arrangements which enhances efficiency and cost reduction with improvement in performance. Without IXP, each ISP may have to individually peer with each CDN which is cumbersome and expensive. For the provision of such service and hardware, entities providing IXPs are usually paid a fee called “port fee”.
3. The Informant is the holder of National Long Distance (NLD) Internet Service Provider (ISP)-A Unified Licenses and provides a carrier-neutral, data centre neutral IXP. It is stated that the services of the Informant can be availed by anyone with an Autonomous System (AS) identified by an Autonomous System Number (ASN).
4. The Informant has averred that it is currently providing IXP services in Mumbai, Delhi-NCR, Chennai, Hyderabad, Kolkata and Bengaluru. It is stated that in addition to the Informant and the OP, there are several other IXPs operating in India. Some of the prominent ones are Amsterdam Internet Exchange India (AMS-IX), DE-CIX.
5. It is stated that the OP, registered in 2003, is a not-for-profit organization under Section 8 of the Companies Act, 2013. It was set up for peering of ISPs among themselves to route the domestic traffic within the country, thereby resulting in better quality of service (reduced latency) and reduced bandwidth charges for ISPs by saving on international



bandwidth. It earns its revenue through internet exchange and .IN registry operations. It is stated that in addition to major data centres like Delhi, Mumbai, Kolkata, Chennai, Hyderabad and Bengaluru, the OP is presently operating in 35 more cities/ towns in India. The Informant has averred that irrespective of its “not for profit” nature, the OP is an 'enterprise' under the Act as it is engaged in the business of providing IXP services of commercial nature.

6. It is stated that there are ISPs who need to connect to such CDNs, but it is not necessary that these ISPs be located in the same city. To connect to these CDNs/ content providers, either the ISP has to physically connect to Internet exchanges in those cities where CDNs have their data centers or to Internet exchanges in the location of the ISP which then connect to the CDNs. Either way, there is a cost of transportation involved for the ISP - directly in the first case and indirectly in the second. This cost is stated to be known by various names such as Transport cost, National long-distance cost, National Private Link cost, Point-to-Point cost or National Ethernet Link cost. Further CDNs / content providers have their data centres located only in certain locations viz. Mumbai, Chennai, Delhi etc.
7. The Informant has delineated relevant market as the '*market of internet exchange services for peering between content providers, CDNs and ISPs in towns/cities in India in which CDNs/content providers are not present/ do not have their data centres*' and has stated that services provided by both the Informant and the OP are interchangeable.
8. It is stated that the OP enjoys a dominant position in the relevant market and has since 2015, posted significant profits from its other heads of revenue. It is stated that as the OP does not pay dividends to its members, it has high amounts of surplus at its disposal which allows it to operate independent of competitive forces. The Informant has submitted that the OP is thus engaged in the business of providing IXP services as a commercial venture. It has also pointed out that as stated in its Annual Report for the year 2020-21, the OP has no loans of any kind.
9. It is averred that there are several expenses attached to the provision of internet exchange services that include the cost of equipment (port); cost of housing such port (charges relating to rent, electricity, security, cooling etc.); personnel costs; administrative costs etc. These expenses are incurred irrespective of where the IXP is situated and are associated



with the setting up and running of any internet exchange. In the relevant geographic market, *i.e.* towns/ cities in India in which CDNs/ content providers are not present/ do not have their data centres, an additional cost is required to be incurred *i.e.* the cost of point-to-point connectivity for the proposed internet exchange in such towns/ cities. It is alleged that the OP is not passing the costs to its customers and providing its services below their cost or discounting all the charges thereby bearing the costs. It is stated that the OP is able to absorb the costs owing to its financial capability. According to the Informant, in the case of Hyderabad, none of these costs are being recovered from the customers (ISPs) by the OP.

10. The Informant has relied upon certain email exchanges in the context of Hyderabad, to substantiate its allegations. It is alleged that the OP had sent an e- mail dated 29.07.2021 to Hyderabad-based ISPs wherein it was stated that it would be providing Mumbai traffic at its Hyderabad port, for which it would not charge any port fee. It is stated that the Informant was pursuing a prospective customer, Aeronet Online Services Pvt. Ltd ('Aeronet'), a Hyderabad-based ISP. Before finalisation of the Informant's contract, Aeronet decided to avail IXP services from the OP as it was offering the services free-of-cost, at least for a few months to begin with. The same was communicated by Aeronet to the Informant *vide* email dated 07.10.2022. The Informant has also cited another instance where it lost a prospective consumer in the name of Netrun Technologies Pvt. Ltd. ('Netrun'), based in Hyderabad owing to the free provision of IXP services by the OP. Netrun apprised the Informant of its decision *vide* email dated 07.10.2022. This has resulted in denial of market access to the OP's competitors such as the Informant. It is alleged that the Informant has lost customers to the OP because it is not charging transportation cost at least in as many as 17 sectors such as Bangalore and Mumbai, Guwahati and Mumbai, Agra and Delhi, Srinagar and Delhi, Lucknow and Delhi, to name a few. The provision of free services has caused revenue loss to the Informant and other players in the industry.

11. The Informant has averred that the OP has a routing and tariff policy which provides for the terms of availing internet exchange services from it. The said policy prescribes connectivity charges payable with effect from 01.01.2021. The OP after the prescription of charges, issued several tenders to establish internet exchanges/ ports across the country. These activities include point-to-point connectivity of upcoming internet exchanges and acquiring space at data centres for upcoming internet exchanges. Thus, the Informant has



alleged that the OP is incurring costs in respect of point-to-point connectivity (from the data centres of CDNs/ content providers to such towns/ cities) and is also incurring costs for housing and operating these ports. However, these costs are not being passed on to its customer/ ISP.

12. Based on the above, the Informant has stated that the OP is resorting to predatory pricing with a view to reduce or eliminate competition in violation of Section 4(2)(a)(ii) of the Act which is leading to denial of market access to other entities like the Informant as per Section 4(2)(c) of the Act.
13. Accordingly, the Informant has prayed to the Commission to initiate an investigation under Section 26(1) against the OP. The Informant has also prayed for an injunction as an interim relief against the OP to prohibit the OP from offering IXP services free of cost or at reduced rates by giving concession of transportation and/or any other constituent cost incurred by the OP on the ground that there is irreparable harm being caused to the Informant and the balance of convenience lies in the favour of the Informant.
14. The Commission considered the matter on 16.05.2023 and sought response of the OP. On 09.08.2023 and 18.08.2023, the Commission directed the OP to file its comments/ response to the Information, with an advance copy to the Informant. The Informant was in turn, directed to file its rejoinder, if any, to the comments/ response filed by the OP.
15. The OP filed its partial response dated 16.08.2023, to the Commission's queries and sought extension of time to file a detailed reply. In its partial response, the OP, *inter alia*, submitted that the major users of OP are ISPs; Telcos and Virtual Network operators' licensees; and all such networks which benefit from peering like Content Players, State Data Centres *etc.* The tariff policy of OP for its peering members consists mainly of membership fee, port charges and joining charges. ISPs are charged based on the capacity of the port they use to connect to the Internet Exchange. Port fees are usually determined by the speed (e.g., 1 Gbps, 10 Gbps, etc.) of the inter-connection and can be billed on a monthly, quarterly or yearly basis. The OP's services are currently available across 27 states/ UT's including metro, Tier 2 and Tier 3 with 77 IXPs covering 62 cities. The number of networks connected to the OP, as on 31.07.2023, is about 300, while the count is above 430 in respect



of the Informant. DE-CIX India and the Informant have been stated to be other major players providing IXP services, besides the OP.

16. In the meantime, the OP filed a letter dated 30.08.2023 requesting the Commission to seek inputs from Department of Telecommunications (DoT) for getting a holistic view of the matter. In the said letter, it also apprised that the Informant had filed a writ petition (W.P. (C) No. 7804/2019) in the Hon'ble Delhi High Court, which is pending. The OP submitted that since the present matter is interconnected, it requested the Commission to make a reference under Section 21A of the Act.

*Detailed reply filed by the OP*

17. The OP filed its detailed reply dated 11.09.2023, in which it denied all the allegations, averments and contentions in the Information.

18. The OP submitted that it has been established as a not-for-profit organisation under the administrative directions of the Ministry of Electronics and Information Technology ('MeitY') for setting up of peering of ISPs among themselves for the purpose of routing the domestic internet traffic within the country for better quality of service (reduced latency) and reduced bandwidth charges for ISPs by saving on international bandwidth. The mandate of the OP is to develop internet exchanges throughout the country in line with the Government's Digital India mission. The long-term objective of the OP includes developing and promoting use of the internet for business, residential and e-governance applications through a collective effort of all members of the internet exchange and thus, the OP has already established 77 Exchange Points in total including tier 2 and tier 3 cities. The OP has, *inter alia*, submitted that the Informant is hindering the OP's objective by initiating frivolous and vexatious litigations like the present case.

19. As preliminary objections, the OP submitted that the TRAI is the regulatory body established by the Government of India which has been tasked with regulating the telecom sector in the country and has also been tasked with regulating/ supervising the activities undertaken by the OP in order to meet its mandate. The OP further submitted that the Commission lacks jurisdiction in the present matter since the jurisdictional aspects involved in the matter have to be adjudicated by the sectoral regulator *i.e.* TRAI/ DoT. Only after



the sectoral regulator comes to the conclusion that the competition law has been violated, the jurisdiction of the Commission would commence.

20. The OP submitted that the Informant, with malafide intention, has wilfully concealed material facts and not disclosed the correct picture to invoke the Commission's jurisdiction. The Informant's grievance against the OP arises from a clarification order dated 25.06.2019 issued by the DoT to the Informant, whereby it has stated that since the Informant is in the business of providing internet exchange services through IXPs, it would require a license under Section 4 of the Indian Telegraph Act, 1885. Aggrieved by the said decision of the DoT, the Informant filed a writ petition (W.P. (c) no. 7804/2019) before the Hon'ble Delhi High Court assailing the said clarificatory order which is currently pending. Since the Informant does not have the requisite license under the Telegraph Act to provide IXP, Tata Communications refused to provide services to them; and a complaint was also lodged against the Informant with the DoT for carrying out its services without obtaining a license. In view of the same, when the Informant sought clarification on the issue from the DoT, they were informed that they would, indeed, require a license under the Indian Telegraph Act. Thus, the Informant is aggrieved by the fact that the Government of India through the DoT and TRAI is trying to bring IXPs like the Informant within a uniform licensing regime under the Indian Telegraph Act and the present Information has been filed to undermine the mandate of the DoT.
21. The OP has stated that the Informant has relied upon certain email communications between the Informant and the two ISPs, namely, Aeronet and Netrun to substantiate the allegation of the loss suffered by the Informant due to the OP's alleged anti-competitive conduct, which cannot, in any manner, be read in isolation. Further, the Informant has failed to annex a Certificate under Section 65B of the Indian Evidence Act, 1872, which is a mandatory requirement. Thus, the said email communications are not admissible and cannot be relied upon.
22. While replying on the merits, the OP submitted that the Informant has erroneously delineated the relevant market as the same is misconceived, baseless and incomplete. The Informant has failed to apply established tests and principles followed under Section 19(5), 19(6) and 19(7) of the Act, to delineate the relevant market in case of abuse of dominant position. The OP is an IXP through a physical location by which Internet infrastructure



companies such as ISPs, CDNs, web enterprises, communication service providers, cloud and SaaS (Software as a service) providers connect to exchange internet traffic across India. The relevant product market delineated by the Informant only for CDNs and ISPs thus, cannot be taken in isolation and the same if considered, would be erroneous. Therefore, the relevant product market is '*Internet exchange services for peering between ISPs, CDNs, web enterprises, communication service providers, cloud and SaaS providers which connect to exchange Internet traffic*'. Keeping in view that the OP is operating in India (including 77 cities and additionally planning to penetrate additional cities), the relevant geographic market should, therefore, be delineated as 'India'. Thus, the relevant market is '*Internet exchange services for peering between ISPs, CDNs, web enterprises, communication service providers, cloud and SaaS providers which connect to exchange Internet traffic in India.*'

23. The OP further submitted that it does not enjoy a dominant position as it is only at third place by way of market presence and that its efforts to interconnect domestic traffic has not been very successful. The OP also stated that it is the Informant who is a dominant player in the market. On the basis of factors listed under Section 19(4) of the Act, the OP, *inter alia*, averred that market share is only one of the factors for assessing dominance. For dominance, it needs to be looked at from the point of view of factors such as traffic hosted by the number of connected networks *etc.* A comparative analysis of the traffic hosted by the OP *vis-à-vis* that of the Informant for the years 2016-17, 2017-18, 2018-19, 2019-20, 2020-21, 2021-22 clearly shows that in spite of the fact that the OP had the first mover advantage by way of its incorporation in 2003, the Informant (who entered the market in 2016) has hosted more traffic consistently over the period from 2016-2022. The statistics accessed from the website of the Informant provides that Informant has traffic of 2.393 Tbps whereas the OP is having traffic of 1.3 Tbps. The OP submitted that in the six cities where the Informant is present it is consistently maintaining more IXs than those of the OP during the period ranging from 2016-2022. It is averred that in six cities including Hyderabad, where the Informant is present, the Informant has nearly four times more connected networks than that of the OP.
24. On the availability of funds and resources, the OP submitted that its resources are intended to enable it to pursue its social and development goal of facilitating internet penetration all





through India, including major cities, Tier 2 and Tier 3 cities and beyond. The Informant, on the other hand, is driven solely by profit motive and is concentrating on six major cities and is planning to start business in the seventh city, Bengaluru. No other Internet exchange provider including the Informant has an exchange center outside metros and couple of Tier 1 cities since their objective is commercial whereas the OP is working for the benefit of the member ISPs enabling growth of internet penetration in the country and internet ecosystem as per its mandate.

25. The OP also submitted that there are other players present in the market such as AMS-IX, Extreme-IX and DE-CIX and there are no entry barriers. The Informant, on the other hand, is a subsidiary of a foreign company ExtremePeering.net having massive cash reserves, resources and technological superiority. The services offered by the holding company Extreme Peering.net and Extreme Labs with Extreme IX is claimed to be a highly successful product. The technology and expertise of the Informant's holding company is superior to that of the OP. Further, size and resources of the OP are to be seen in relative terms and not in isolation. The Informant did not reveal its own size and resources. The Informant currently has a network of over 350 ISPs directly connecting content providers like Google, Facebook, Netflix, Amazon, and Akamai and is operational in Mumbai, Delhi, Chennai, Hyderabad and Kolkata and has the most number of members/ CDNs.
26. The OP has no economic advantage over the competitors and TRAI has time and again recommended that the OP upgrade its capacity. The OP is a stand-alone company with multiple social and developmental objectives whereas the Informant is an Indian subsidiary of a foreign company with access to advanced technology and substantial financial support. There is no vertical integration maintained by the OP. However, on the other hand, a co-subsiary of the Informant is working in tandem in a closely related product market and is effectively vertically related to its holding company Extreme Peering.net which is a prominent company having product offerings superior to that of the OP in India.
27. There is no dependence of the consumers on the OP. There are no lock-in provisions for customers on any ISPs and consumers enjoy considerable countervailing power. The consumers have, in fact, switched from the OP in the past period. There has been no monopoly status enjoyed by the OP by virtue of being a Government Company. There are



no entry barriers in the nature of regulatory barriers in the business of internet exchanges and the market is open. There is an economic and social mandate upon the OP to increase internet penetration and adoption in India, whereas the Informant is free to conduct its business in the manner it wants. The relative advantage is with the Informant rather than with the OP.

28. On allegations of abuse, the OP contended that the predatory pricing under the Act, necessarily involves an enterprise to have substantial market power and dominance; the 'intent' to oust competitors or reduce the competition in the market and certain level of entry barrier to prevent competitors to re-enter the market. In addition, it also involves engaging in conduct of pricing below cost (as defined in CCI Cost of Production Regulations, 2009) which is usually below the average variable cost, and eventually recouping losses incurred in the process, over a period of time. The intent is to reduce competition or eliminate the competitors. Predatory intent and recoupment of losses/profits are thus *sine qua non* for establishing predation by a dominant player under the Indian competition regime and both of these are not satisfied in the instant case.
29. The OP has stated that with effect from the beginning of 2023, it has increased the prices for its services. Lower prices were part of the fulfilment of OP's mandate to create a market in Hyderabad and was only for a 6–8-month period. Moreover, there was no ISP/telco present in Hyderabad. However, due to change in its CDN joining policy in 2019, the OP was able to connect not just Hyderabad but also a few key cities within India. Further, as per the OP, it had first entered the market in Hyderabad in 2021, while the Informant entered the market in 2022. It charged concessional prices with the intent to create a market in Hyderabad and was not competing with any of the players in the market. The OP also contended that the emails relied upon by the Informant have to be properly appreciated. As regards the email dated 29.07.2021, the OP submitted that the offer made in Hyderabad was not to meet any competition since no other player existed in the market and the same was made in collaboration with the government department which is responsible for monitoring the social and economic objectives mandated to the OP. Moreover, the offer made by the OP was temporary and for a limited time with a view to creating a market. The same is also evident from Aeronet's email dated 07.10.2022. Further, another customer (Quicknet Communications Pvt. Ltd./Quicknet) left the Informant due to low business



generated by the Informant and not due to low price offered by the OP. The OP submitted that every provision of service involves costs but in the case of not-for-profit organisations unlike profit making entities, the costs are internalised in the sense of being borne by the organisation itself rather than being passed on to the consumers who avail the services. The Informant failed to discharge the burden of proving that the scheme followed by the OP could result in driving out of the competitors from the market in as much as the market of internet exchange is flourishing with other players. The Informant has also failed to prove that the OP could later raise prices for consumers to recoup costs. On the contrary, the OP in discharging of its functions continued to penetrate the internet market all over India, including in Tier 2 and Tier 3 cities and beyond, to give connectivity to as many users as possible.

30. On allegation of denial of market access, the OP submitted that the allegation merely on the basis of the two emails of Aeronet and Netrun, is patently false and unmerited. It is evident that there are various other players operating in the relevant market and the content providers and CDNs have the option to choose their preferred IXPs.
31. Therefore, the OP submitted that it is not in a dominant position. The ingredients of Section 4 of the Act for abuse are not met and no evidence has been adduced by the Informant to show any alleged abuse.
32. On 10.01.2024, the Commission noted that the Informant did not file any rejoinder within the stipulated time, and decided to call the parties for a preliminary conference on 14.02.2024.
33. On 14.02.2024, the parties made their oral submissions considering the relevant geographic market to be pan-India. After hearing the parties at length, the Commission directed them to file a written synopsis of their oral submissions. The Commission further directed the parties to file certain data pertaining to their market presence.

*OP's written arguments*

34. The OP reiterated its stand taken in its reply such as lack of jurisdiction, reference under Section 21A, concealment of previous litigation by the Informant, erroneous delineation of the relevant market, no dominance/substantial market power of OP, no ingredient of



predatory pricing being met, emails not to be read in isolation and the content providers and CDNs having options to choose their preferred IXPs. The OP also relied upon certain judgments to canvass its aforesaid submissions in the matter.

*Informant's written arguments*

35. The Informant submitted that the argument of OP that the issue be placed before TRAI is wholly misconceived in view of the present *lis*. The OP has failed to point out any preliminary aspects which may merit interference of TRAI. There is no dispute as to the relevant product market as it is the internet exchange services between content providers, CDNs and ISPs and the relevant geographic market is towns/cities in India in which CDNs/content providers are not present/do not have their data centers. Not all CDNs may have their data centers even in three metropolitan cities and, as such, there may be a cost of transportation involved in carrying traffic even from one metropolitan city to another. Also, since IX services can be provided anywhere in India, the geographic market would be India. The OP is the oldest IX provider in the country and hence, it cannot resort to attractive pricing to penetrate any market in India as a new entrant.
36. The Informant submitted that it has never been its case that the determinant of dominance in this case is market share. The OP is using its revenues from other sources (.in domain) to subsidize provision of IX services below cost and is able to operate independently of competitive forces. The OP is incurring costs (transportation/ interconnection fees) and is not passing it on to its customers. It cannot take the defence of providing attractive pricing for short period to penetrate a new market as it admittedly did in Hyderabad. Whether the service is being provided at zero cost in other areas is to be investigated.
37. The Informant submitted that the OP admitted to charging port fees for IX but not interconnect fees and that the OP is financially well placed and capable of operating independently of competitive forces/considerations. The Informant further submitted that the tenders issued by the OP and the material placed on record by the Informant show that there is in fact a transport/ interconnect charge associated with supply of content which the OP absorbs.
38. The Informant submitted that the OP's non-profit nature cannot exclude it from being an enterprise. It further said that the intention of the OP has always been that the entire



domestic traffic passes through it. Relying upon *Uber (India) Systems Pvt. Ltd. v CCI [(2019) 8 SCC 697]*, as per the Informant, the act of supplying services free or below cost is inherently anti-competitive.

39. It was also submitted that the Informant and the OP are engaged in same commercial service and thus, subject to the Competition Act, 2002. The OP provides these services at zero/ below cost. The OP's case that it provides these services at zero/ below cost in compliance with social obligations/ social mandate is not acceptable because Report of Task Force on the Growth of Internet in the country dated August 2002 (TRAI Report) specifically states that the OP was charging and must charge 'cost-plus'. Further, since there is no categorical or specific denial of these facts, the contents of the Information be taken as admitted by the OP.
40. Further, the Informant stated OP failed to show that the below cost pricing or zero price was adopted to meet competition and social cost/ obligation cannot be considered as an objective justification for predatory pricing.
41. Internet Exchange facilitates connection between ISPs and local/ international content providers/ CDNs. These CDNs provide data centres in select cities in India. It was stated that the places where such CDNs are not situated, the provision of services entails costs which are to be paid to telcos. This cost is not passed on to their customers by the OP. The OP has offered free services in Hyderabad in the past and admitted with a caveat that it happened during the period September 2021 to December 2022. It did not pass transportation cost for 16 months in Hyderabad and is thus, engaged in predatory pricing or zero pricing.
42. The Informant is suffering on account of termination of contracts by its existing customers after connecting with the OP or are no longer interested in Informant's services due to provision of free/ cheaper services by the OP (such as email of Quicknet).
43. The Informant stated that the harm caused by OP's pricing is irreversible and balance of convenience lies in favour of grant of interim relief. Thus, in view of its submissions, the *prima facie* case exists. The Informant also relied upon certain judgments to canvass its submissions in the matter.



#### *Additional documents filed by the Informant*

44. The Informant filed an affidavit containing certain documents (confidential and non-confidential version) on 14.03.2024, to substantiate its submissions made during the preliminary conference on 14.02.2024.
45. The Informant, *inter alia*, reiterated that transport cost or carriage cost is a cost component for providing internet exchange services in places other than where CDNs are situated. Telecom service providers allow IXP providers such as the Informant and the OP to connect CDNs and ISPs situated in different cities and to operate in non-CDN areas for which IXP has to incur cost. In this regard, the Informant has attempted to show through its invoices and certain OP's invoices that both the Informant and the OP are charging port fees, however, no charge is being collected by the OP as through transportation charges unlike the Informant. Owing to this, the Informant lost its existing business and faces potential loss. The Informant has claimed confidentiality over the contents of such invoices and tables indicating customers and losses as assessed by the Informant.
46. In its meeting held on 12.06.2024, the Commission noted that the OP and the Informant filed their written synopsis alongwith certain data, on affidavit, on 29.02.2024 and 14.03.2024, respectively. Additionally, the Informant filed an affidavit containing certain documents in confidential and non-confidential version on 14.03.2024, stated to have been referred to in the preliminary conference. After perusal of the material available on record, the Commission decided to pass an appropriate order in due course.

#### *Analysis of the Commission*

47. The Commission has perused and examined the submissions made by the parties at various stages and the information available in public domain.
48. At the outset, the Commission would proceed to deal with the preliminary objection raised by the OP that the Commission lacks inherent jurisdiction to deal with the matter. It has stated that the Writ Petition No. 7804 of 2019 filed by the Informant before the Hon'ble Delhi High Court (Extreme Infocom Pvt. Ltd. v. Union of India & Anr) is *sub judice*. The petition pertains to a challenge to the Union of India's clarification order dated 25.06.2019 issued to the Informant which held that an Internet Exchange Point (*i.e.* the Informant) requires a license under Section 4 of the Indian Telegraph Act, 1885, which squarely falls



within the ambit of DoT and TRAI. The OP has submitted that TRAI has been tasked with the regulation of the telecom sector and also regulating/ supervising the activities undertaken by the OP. As background, the OP has submitted that TRAI had recommended to Government of India for setting up of a domestic internet exchange and consequently, the OP was envisaged as a central body to handle interconnection of domestic internet traffic between peering ISP members. The OP is carrier neutral and does not compete with the other member ISPs and works on non-profit basis. The mandate has been granted by the Government to the OP which is a public authority, in furtherance of Article 39(b) of the Indian Constitution. Thus, TRAI being the sectoral regulator is the appropriate forum where any complaint or dispute with respect to the OP's alleged malafide or illegal activities can be agitated. Only after proceedings before TRAI have attained finality, the Commission has the jurisdiction to enquire into any alleged abuse of dominance by an entity working in the telecom sector. The OP has relied upon judgments particularly the judgment of the Hon'ble Supreme Court of India in *Competition Commission of India v. Bharti Airtel Ltd. (2019) 2 SCC 521 (Bharti Airtel case)*, to canvass its position and has submitted that TRAI being the regulator would determine jurisdictional aspects on merits and return a *prima facie* conclusion that there had been a violation of the competition law. Thereafter only the Commission could initiate an investigation according to the provisions of the Act. Further, the Commission may utilise its powers under Section 21A of the Act and refer the matter to TRAI *suo motu* or by treating its preliminary cum reply as an application for the same.

49. The preliminary question which falls for consideration upon the Commission is whether there is any issue involved in the present matter which may oust the jurisdiction of the Commission or may merit invocation of Section 21A in the present proceedings.
50. The Commission observes that the obligation to comply with the provisions of the Act and maintain fair competition in the market is independent of the obligation to comply with the provisions of TRAI Act/Regulations, and violation of one need not *ipso facto* result in violation of the other. The Commission is, *inter alia*, entrusted with the duty of eliminating practices having an adverse effect on competition, to promote and sustain competition in markets, to protect the consumers and to ensure freedom of trade carried on by other participants in the market. As a sectoral regulator, the TRAI may formulate and enforce obligations through appropriate code of conduct for the entities operating in the telecom



sector, keeping in view its sector-specific objectives. However, compliance with the TRAI regulatory framework remains independent of the possibility of any practice of an entity operating in the telecom sector falling afoul of the provisions of the Act. This has also been upheld by the Hon'ble Supreme Court of India in the Bharti Airtel case (*supra*) wherein it has categorically held that the Commission's jurisdiction would not be completely ousted merely due to the existence of a sectoral regulator. While addressing the apparent overlap between the powers of TRAI and the Commission, the Hon'ble Court appreciated the exclusive jurisdiction that remains with the Commission to determine whether a particular agreement is in contravention of the provisions of the Competition Act and this specific and important role assigned to the Commission cannot be wished away. The Hon'ble Supreme Court held as under-

*"109) The CCI is specifically entrusted with duties and functions, and in the process empower as well, to deal with the aforesaid three kinds of anti-competitive practices. The purpose is to eliminate such practices which are having adverse effect on the competition, to promote and sustain competition and to protect the interest of the consumers and ensure freedom of trade, carried on by other participants, in India. To this extent, the function that is assigned to the CCI is distinct from the function of TRAI under the TRAI Act. Learned counsel for the appellants are right in their submission that the CCI is supposed to find out as to whether the IDOs were acting in concert and colluding, thereby forming a cartel, with the intention to block or hinder entry of RJIL in the market in violation of Section 3(3)(b) of the Competition Act. Also, whether there was an anti-competitive agreement between the IDOs, using the platform of COAI. CCI, therefore, is to determine whether the conduct of the parties was unilateral or it was a collective action based on an agreement. Agreement between the parties, if it was there, is pivotal to the issue. Such an exercise has to be necessarily undertaken by the CCI..."*

51. The OP's submission that the entity's existence stems from sectoral regulator's recommendations and thus, it is within the domain of TRAI and not Commission's, does not hold water. It will be erroneous to interpret the above-referred judgment of the Hon'ble Supreme Court to mean that in every case of overlap of jurisdiction with a sectoral regulator, the Commission will have to withhold taking action and await examination by the sectoral regulator. This would render the object and purpose of the Competition Act, 2002, nugatory. The law laid down by Hon'ble Supreme Court in the Bharti Airtel case (*supra*) was specific to the peculiar facts of that case. A universal application of the law laid down on those particular facts cannot be inferred and implied in all cases where the Commission is exercising its jurisdiction in sectors which are also regulated by a sectoral regulator. It has also been observed by the Hon'ble Apex Court in K.T.M.T.M. Abdul





Kayoom and Others v. Commissioner of Income Tax, AIR 1962 SC 680 that “each case must turn upon its own facts” and further that:

*“26. ... Each case depends on its own facts, and a close similarity between one case and another is not enough, because even a single significant detail may alter the entire aspect. In deciding such cases, one should avoid the temptation to decide cases (as said by Cordozo) by matching the colour of one case against the colour of another. To decide, therefore, on which side of the line a case falls, its broad resemblance to another case is not at all decisive. ...”*

This was also the view of the Hon’ble Supreme Court in *State of Rajasthan v. Ganeshi Lal*, (2008) 2 SCC 533.

52. Further, the allegation in the present matter is that the OP, an IXP, is a dominant entity in the relevant market and has indulged in predatory pricing (provided internet exchange services for free/below cost) leading to a denial of market access to the Informant which is also an IXP. The Commission notes that the issues arising in the present matter pertain to abuse of dominant position which involves examination of relevant market, dominance and then return a finding on any allegation of abuse of the dominant position (such as predatory pricing). Such determination can be addressed under the provisions of the Act. It is clear that the allegations involved in the present matter are determinable within the legal mandate given to the Commission. Thus, the Commission does not find any merit in the preliminary objection regarding lack of jurisdiction in the matter. Further, seeking opinion of any statutory authority such as TRAI under the provisions of Section 21A of the Act is the prerogative of the Commission and may be exercised in appropriate cases, as deemed fit by the Commission.

53. After having decided the preliminary objection as to jurisdiction, the Commission now proceeds to examine the case on merits.

54. The Commission notes that the Informant has alleged contravention of provisions of Section 4 of the Act. In this regard, the Commission notes that the Informant has delineated (in Information) relevant market as provision of ‘*internet exchange services for peering between content providers, CDNs and ISPs in towns/cities in India in which CDNs/content providers are not present/do not have their data centres*’. On the other hand, the OP submitted that the relevant market ought to be as provision of ‘*internet exchange services for peering between ISPs, CDNs, web enterprises, communication service providers, cloud*



and SaaS providers which connect to exchange internet traffic in India'. During the preliminary conference, the Commission noted that both parties made their submissions considering relevant geographic market as 'pan-India'. Thus, considering the homogeneous nature of services throughout India provided by the parties in the matter, the Commission deems it appropriate to delineate relevant market as 'provision of internet exchange services in India'.

55. As regards dominance, the Commission notes that besides the parties herein, there are other players in the relevant market such as AMS-IX, DE-CIX *etc.* which indicates lack of entry barriers in the market. Further, on the basis of the submissions of the parties during the preliminary conference, the Commission sought the following information from the parties:

- a. Total market size at pan-India level along with city-wise breakup where IXP services are provided during the period 2016-17 to 2022-23 in terms of volume of traffic, number of IX points and number of connected networks.
- b. Party's respective market presence at pan-India level along with city-wise breakup during the period 2016-17 to 2022-23 in terms of volume of traffic, number of IX points and number of connected networks.

56. The Informant in its submission stated that it does not have the information pertaining to the total market size pan-India level and hence, is not able to provide the information of the same. The Informant submitted certain year-wise data under the heads of total customers alongwith customer connected from one city to another. On the other hand, the OP submitted data mentioning name and number of IX points and total traffic. The OP also submitted city-wise data under the heads such as date of inception of IXP, membership fee, date of membership fees levied, port fees, date of port fees levied, one time joining charges, rack charges and reconnection charges. The Commission notes that the parties have not provided the market data on the variables and time period as sought.

57. Be that as it may, the Commission places reliance on the earlier submissions of the OP. The OP stated that the Informant hosted higher traffic of 2.393 Tbps whereas the OP is having traffic of 1.3 Tbps. The Commission notes that the Informant has stated the traffic to be 1.6 Tbps in about 35 points of presence across 6 cities. As per OP, the number of networks connected with the OP as on 31.07.2023 was about 298, while the Informant's was about 430. Further, the OP submitted that in the last 20 years, it has managed only approximately



298 ISPs. Also, the OP submitted that the Informant currently has a network of over 350+ ISPs. Further, the OP provided the following data:

Table 1: Number of connected networks in six markets where the Informant is present

Year	OP	Informant
2016-17	113	33
2017-18	114	151
2018-19	114	272
2019-20	114	363
2020-21	110	426
2021-22	139	520

Table 2: Number of IX points in six markets where the Informant is present

Year	OP	Informant
2016-17	06	05
2017-18	06	08
2018-19	06	13
2019-20	06	15
2020-21	07	24
2021-22	09	30
2022-23	22	38

58. From the aforesaid, the Commission observes that the Informant appears to have more IX points and greater number of connected networks than those of the OP during the period 2016-22 in six markets where the Informant is present (*i.e.* Mumbai, Delhi-NCR, Chennai, Hyderabad, Kolkata and Bengaluru).

59. The Commission also takes note of the email dated 18.06.2022 sent to Railtel by the Informant stating that it has been operating internet exchange for the last 6 years which is the biggest IX of India (600+ AS networks and 1.8 Tbps of traffic between its 35 DCs/8 cities).

60. Based on the data provided by the OP, it appears that in terms of volume of traffic and number of connected networks, the Informant has significant presence vis-à-vis OP in abovementioned six cities. The Commission also notes that despite the OP being the oldest IX provider and the much later entry of the Informant in the market, the Informant has been able to increase its relative presence in the relevant market which suggests that the relevant market remains contestable. It cannot be concluded that the OP is in a position to affect the relevant market in its favour and thus, the OP does not seem to hold any particular advantage over the competitors in the relevant market, as alleged. Thus, from the data



available on record and the facts and circumstances present in the matter, the Commission is of the view that dominance of the OP is not getting established. Accordingly, the Commission is not inclined to delve further into the matter.

61. In view of the foregoing analysis based on facts and circumstances present in the matter, the Commission is of the view that the OP does not appear to be dominant in the aforesaid delineated relevant market and consequently, there is no competition concern arising in the present matter. Therefore, the matter is directed to be closed forthwith under Section 26(2) of the Act.
62. Before concluding with this order, the Commission observes that the Informant has submitted certain documents as part of additional submissions dated 14.03.2024 over which confidentiality has been sought. The Commission grants confidentiality on such documents for a period of 3 years from the passing of this order, subject to the provisions of Section 57 of the Act. It is, however, made clear that no such confidentiality claim shall be available in respect of the information that might have been referred to in this order, and has not been specifically redacted herein.
63. The Secretary is directed to communicate the decision of the Commission to the parties, accordingly.

**Sd/-**  
**(Ravneet Kaur)**  
**Chairperson**

**Sd/-**  
**(Anil Agrawal)**  
**Member**

**Sd/-**  
**(Sweta Kakkad)**  
**Member**

**Sd/-**  
**(Deepak Anurag)**  
**Member**

**New Delhi**  
**Date: 20/08/2024**