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**ISSUES PRECEDING CCI INVESTIGATION  
OF ABUSE OF DOMINANCE IN SEP CASES:  
ITS RELEVANCY AT THE STAGE OF INITIATING INVESTIGATION  
AGAINST SEP HOLDERS**

**DR. INDRANATH GUPTA AND DR. VISHWAS H. DEVAIAH**  
JINDAL INITIATIVE ON RESEARCH IN IP AND COMPETITION  
JINDAL GLOBAL LAW SCHOOL

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Its relevancy at the stage of initiating investigation against SEP holders**

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Authored by  
**Prof (Dr.) Indranath Gupta and Prof (Dr.) Vishwas H. Devaiah**  
Jindal Initiative on Research in IP and Competition  
Jindal Global Law School

O.P. Jindal Global University  
Sonipat-Narela Road,  
Near Jagdishpur Village,  
Sonipat, Haryana 131001,  
India.

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## **Issues preceding CCI investigation of abuse of dominance in SEP cases: Its relevancy at the stage of initiating investigation against SEP holders<sup>1</sup>**

### **1 Introduction**

The ICT sector has witnessed unprecedented growth and increased competition with multiple players entering the foray in recent times. This growth is nurtured by rapid innovations in the technology, which is quickly embraced by smartphone manufacturers by entering into licensing arrangements with multiple innovators. While 2016 witnessed some relatively flat smartphone sales, it is worth noting that the Indian smartphone sector has witnessed 17.1 percent growth in the same period.<sup>2</sup> India accounted for the second largest telecommunication network in the world with nearly 1.05 billion subscribers.<sup>3</sup> With nearly 342 million internet subscribers, most of whom use their mobile phones to access internet, India has the third highest internet users.<sup>4</sup> This boom in the number of subscribers of telecommunication network and internet subscribers is largely facilitated through drop in the average selling price of smartphones.<sup>5</sup> The average selling price of

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<sup>1</sup> Prof (Dr.) Indranath Gupta and Prof (Dr.) Vishwas H. Devaiah. This is a working paper, please do not quote without the permission of the authors. The authors are ever so thankful to Mr. Dipesh Ashok Jain, research assistant, JIRICO for his extensive help during the course of research. The authors are thankful to Ms. Ritu Rathi and Prof. Avirup Bose of JIRICO, Jindal Global Law School, O.P. Jindal Global University for their support and ideas.

<sup>2</sup> IDC India, 'After Successive Decline for Last Two Quarters, Indian Smartphone Market Recovers with 17 Percent Growth in Q2 2016: IDC India' (19 August 2016)

<<https://www.idc.com/getdoc.jsp?containerId=prAP41685916>> accessed on 3 January 2017.

<sup>3</sup> Indian smartphone industry surpassed the US to become the world's second-largest market by users in 2016. 'Flagship phones ruled the Indian smartphone industry in 2016' *India Today* (16 December 2016) <<http://indiatoday.intoday.in/technology/story/flagship-phones-ruled-the-indian-smartphone-industry-in-2016/1/835995.html>> accessed on 3 January 2016.

<sup>4</sup> PTI, 'Internet users in India reached 342.65 million in March' *The Economic Times* (20 July 2016) <<http://economictimes.indiatimes.com/tech/internet/internet-users-in-india-reached-342-65-million-in-march/articleshow/53303765.cms>> accessed on 3 January 2016.

<sup>5</sup> Boston Consulting Group, 'The Mobile Revolution: How Mobile Technologies Drive a Trillion-Dollar Impact' (15 January 2015) <[https://www.bcgperspectives.com/content/articles/telecommunications\\_technology\\_business\\_transformation\\_mobile\\_revolution/](https://www.bcgperspectives.com/content/articles/telecommunications_technology_business_transformation_mobile_revolution/)> accessed on 3 January 2017.

smartphones dropped from ₹13,000 to ₹ 10,700.<sup>6</sup> The availability of smartphones at less than \$100 has triggered increased sale of these devices in tier 2 and tier 3 cities in India.<sup>7</sup>

The Indian smartphone market share is dominated by Indian and Chinese manufacturers like Micromax (12.9 %) and Intex (7.1%).<sup>8</sup> The Chinese brands like Lenovo, Xiaomi, Huawei, Gionee, One Plus, Oppo collectively have a market share of 32% of the smartphone market.<sup>9</sup> The premium smartphone market in India is a mere 0.6 percent and has barely witnessed any significant growth as the Indian market is a fairly price sensitive and features scrutinizing market.<sup>10</sup>

The prevailing competitive environment in smartphone markets in India is largely facilitated by the global licensing arrangements entered into between Standard Essential Patent (SEP) holder and implementers (largely domestic and foreign smartphone manufacturers). However, there have been instances where the implementers, largely domestic Indian manufactures, have filed a complaint at the Competition Commission of India (CCI) against SEP holder alleging abuse of dominant position. There have also been instances (at least 10) where the SEP holder has sought injunctive relief against implementers for infringing their patents. Given the competitive nature of Indian smartphone market and the simultaneous drop in prices it is relevant to examine the developments that led to multiple legal proceedings in multiple fora like CCI, Intellectual Property Appellate Board (IPAB), Delhi High Court (DHC) and Supreme Court (SC). This paper seeks to understand the underlying reasons that triggered a litigation frenzy and antitrust complaints between SEP holders and implementers. It seeks to understand the process adopted by CCI to examine the complaints filed by the implementer and whether

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<sup>6</sup> Abhishek, 'Indian Smartphone Users Prefer Scrutinizing Price and Features, Not Brand' (4 February 2016) <<https://dazeinfo.com/2016/02/04/smartphone-market-india-users-preferences-price-features/>> accessed on 3 January 2017.

<sup>7</sup> *ibid.*

<sup>8</sup> Micromax and Intex have been the top five smartphone makers in India in 2014 and 2015; IDC India, 'After Successive Decline For Last Two Quarters, Indian Smartphone Market Recovers With 17 Percent Growth In Q2 2016: IDC India' (19 August 2016) <<https://www.idc.com/getdoc.jsp?containerId=prAP41685916>> accessed on 3 January 2017.

<sup>9</sup> Priyanka Pugaokar, 'Chinese Smartphones Rule Indian Market This Diwali' (29 October 2016) <<http://www.cxotoday.com/story/chinese-smartphone-cos-rule-india-market-this-diwali/>> accessed on 3 January 2017.

<sup>10</sup> Abhishek, 'Indian Smartphone Users Prefer Scrutinizing Price and Features, Not Brand' (4 February 2016) <<https://dazeinfo.com/2016/02/04/smartphone-market-india-users-preferences-price-features/>> accessed on 3 January 2017.

it is necessary for the CCI to take into account certain relevant information while initiating investigation against the SEP holder.

Section two explores whether there is a conflict between the Competition Act and Patents Act 1970 and whether the CCI has the authority to investigate complaints that involve patent related issues. Section three examines the exchange of information and communications between the SEP holder and the implementer leading up to the investigation of the CCI. Section four examines the processes followed by the CCI after a complaint is filed. Section five concludes that the CCI should take into account certain relevant information that is available before arriving at a prima facie decision by declaring an opposite party of indulging in abusing its dominant position and thereby starting a detailed investigation.

## **2 CCI v Ericsson: Navigating through the complex web**

The recent decision involving *CCI v Ericsson* suggested a possible conflict and tension between the Patents Act on one hand and the Competition Act on the other.<sup>11</sup> Ericsson suggested that the Patents Act is self-sufficient to resolve all existing disputes between the SEP holder (Ericsson) and the implementer or manufacturing company using the patented technology.<sup>12</sup> With the status of a special legislation, the Patents Act will override the provisions of a general legislation such as the current Competition Act. Ericsson filed a writ petition under Art. 226 of the Indian Constitution challenging the jurisdiction of the CCI under Section 26(1) to commence a detailed investigation.

The CCI relied on the SC decision in *Competition Commission of India v. Steel Authority of India Ltd. & Anr.* ((2010) 10 SCC 744) suggesting that an order under S. 26(1) of the

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<sup>11</sup> *Telefonaktiebolaget LM Ericsson (Publ) v. Competition Commission of India*, Case W.P.(C) 464/2014 & CM Nos.911/2014 & 915/2014 and W.P.(C) 1006/2014 & CM Nos.2037/2014 & 2040/2014 dt. 30.03.2016 (hereinafter *Ericsson v CCI*). In about three cases involving Ericsson in India it was suggested that Ericsson failed to offer the use of SEPs on FRAND terms. FRAND commitment for Ericsson arises under clause 6 of the European Telecommunication Standard Institute (ETSI) IPR policy;

<sup>12</sup> Chapter XVI of the Patents Act, 1970 covers working of patents, compulsory licensing and revocation of patents. S. 84(7) of the Patents Act includes grant of a compulsory licence in the case where a patent holder refuses to grant licences on reasonable terms. Ericsson cited cases like (*General Manager Telecom v. M. Krishnan & Anr.*, JT 2009 11 SC 690; *Chairman, Thiruvalluvar Transport Corporation v. Consumer Protection Council*, 1995 2 SCC 479). Ericsson also suggested that S. 4 of the Competition Act, 2002 was not applicable with regard to licensing of SEPs. This was because Ericsson was not an 'enterprise' as per S. 2(h) of the Act. Further licensing of patents did not amount to the sale of goods and services and as a result would not fall within the ambit of the Competition Act.

Act was an administrative direction and hence could not be considered as an adjudicatory decision. Therefore, the direction under the same would not fall within the ambit of judicial review under Article 226.<sup>13</sup> The CCI suggested that Patents Act and Competition Act work together without any conflict.<sup>14</sup>

The DHC suggested that both legislations have different objectives and therefore an abuse of dominance investigation can be taken up by the CCI, while the patent infringement case is pending at the DHC. With the overall idea of resolving competition issues in India, the Competition Act has been enacted. Therefore, both the legislations can act supplementary to each other.

This was the first time in the ICT sector when the court in India was asked to decide the jurisdiction of the Competition Authority. Since the writ petition was filed as a result of the investigation started by the CCI, it becomes important to assess the situation that existed prior to the investigations under section 26(1).<sup>15</sup> It is also imperative to see what all information CCI would be willing to consider at the time of such investigation.

### **3. Failed negotiations and forced litigations**

It is interesting to note that the investigating process started by CCI never talked about the incidents leading up to the process. Of course, the form that is required by the informant only requires to state the possible abuse contemplated under the various provisions of the Competition Act. In fact, at the stage of prima facie investigation whenever the opposite party has been called, the incidents that had led to the complaint by the informant had not been discussed. This prima facie stage and the issues surrounding the investigation of CCI have been discussed in greater details in Section four of this paper. The incidents particularly considered in relation to the cases in the ICT sector are the negotiation process of FRAND rates, the grant of injunctions and parallel

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<sup>13</sup> Following S. 60 of the Act with reference to (*Union of India v. Competition Commission of India*, AIR 2012 Del 66; *M/S Fair Air Engineering Pvt. Ltd. v. N K Modi*, 1996 6 SCC 385) the provision of competition law will prevail in case of inconsistency with any other law.

<sup>14</sup> *Gujarat Urja Vikash Nigam Ltd. v. Essar Power Ltd.*, 2008 4 SCC 755.

<sup>15</sup> For a detailed discussion on issues relating to jurisdiction and competition authorities please see Shubha Ghosh and D. Sokol, 'FRAND in India', *Competition Policy and Regulation in India: A Economic Approach*; OUP (India) (2016, Forthcoming).

proceedings at the IPAB. Only those cases will be considered where the informant went to the CCI and lodged a complaint against the SEP holder.

### **3.1. Saga of failed negotiation**

In all cases we have come across situations where parties have not been able to decide the issues related to licensing of SEPs. While there have been prolonged discussions, they have failed owing to multiple reasons.

#### **3.1.1 *Ericsson v Micromax***

Micromax, the Indian manufacturer was involved in importing, assembling, marketing, selling, offering for sale etc., various devices that used AMR, 3G and EDGE patented technology of Ericsson without obtaining any licence.<sup>16</sup> In the first letter dated the 3<sup>rd</sup> of November 2009 Ericsson for the first time brought this issue of unauthorized use to the knowledge of Micromax and initiated the process of negotiation. The first phase of negotiation went on for more than four years (November, 2009 until March, 2013). The following gives an overall understanding of the events as it happened during those four years<sup>17</sup>:

- a. In the first notice sent on 3<sup>rd</sup> November, 2009 Ericsson informed about the infringement committed by Micromax and invited them to enter into a Non-Disclosure Agreement(NDA) for the purpose of initiating negotiations for a FRAND license for the use of the patented technologies;<sup>18</sup>
- b. In response, Micromax expressed its inability to respond to the above notice suggesting that the details of the infringed patents were missing in the letter;<sup>19</sup>
- c. Ericsson in a subsequent letter dated 5<sup>th</sup> February, 2010 without divulging the entire details of the infringed patents provided certain examples and

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<sup>16</sup> *Telefonaktiebolaget LM Ericsson (Publ) v Mercury Electronics & Anr*, CS (OS) No. 442 of 2013, Order dt. 06.12.2013, [2] & [7].

<sup>17</sup> For instance, the negotiation process lasted four months in *Huawei v ZTE*. Case C-170/13, Huawei Technologies Co. Ltd v ZTE Corp.,[2014] Opinion of Advocate General Wathelet [27].

<sup>18</sup> Case No. 50/2003, Competition Commission of India, Order dt. 12.11.2013, [3] & [4]; It is a standard industry practice, thus unlike CCI we have no recorded observation suggesting NDA per se as abusive.

<sup>19</sup> *Telefonaktiebolaget LM Ericsson (Publ) v. Competition Commission of India*, Case W.P.(C) 464/2014 & CM Nos.911/2014 & 915/2014 and W.P.(C) 1006/2014 & CM Nos.2037/2014 & 2040/2014 dated 30.03.2016 [12.1].



further requested Micromax to enter into an NDA.<sup>20</sup> In fact in April 2011, Ericsson suggested that they had shared information with Micromax about the patents in question, which was denied by Micromax.<sup>21</sup> A further notice was sent by Ericsson on 29<sup>th</sup> June, 2011 suggesting Micromax to sign the NDA;<sup>22</sup>

d. Finally, on 16<sup>th</sup> January, 2012, the parties signed an NDA<sup>23</sup> and thereafter Ericsson intimated Micromax about the FRAND licensing terms.<sup>24</sup> Unfortunately, Micromax did not agree with the licensing terms and the patent licensing agreement was not executed.<sup>25</sup> Later in March, 2013 when there was complete breakdown of the negotiation process, Ericsson filed a case of patent infringement against Micromax.<sup>26</sup>

As a result of the patent infringement suit, the DHC granted Ericsson an ex parte interim order.<sup>27</sup> This created multiple restrictions on Micromax from the point of import of goods that had Ericsson's technology and opened them up for further scrutiny.<sup>28</sup> Meanwhile on 19<sup>th</sup> March, 2013 the parties entered into an interim arrangement.<sup>29</sup> As a part of the arrangement, the parties agreed to continue negotiation of the licensing terms

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<sup>20</sup> *ibid* [12.2].

<sup>21</sup> *ibid* [12.3].

<sup>22</sup> Case No. 50/2003, Competition Commission of India, Order dt. 12.11.2013, [3] & [4].

<sup>23</sup> *Telefonaktiebolaget LM Ericsson (Publ) v. Competition Commission of India*, Case W.P.(C) 464/2014 & CM Nos.911/2014 & 915/2014 and W.P.(C) 1006/2014 & CM Nos.2037/2014 & 2040/2014 dt. 30.03.2016, [12.4].

<sup>24</sup> *ibid* [12.4]; Case No. 50/2003, Competition Commission of India, Order dt. 12.11.2013, [4].

<sup>25</sup> In terms of royalty rates and royalty base; *Telefonaktiebolaget LM Ericsson (Publ) v. Competition Commission of India*, Case W.P.(C) 464/2014 & CM Nos.911/2014 & 915/2014 and W.P.(C) 1006/2014 & CM Nos.2037/2014 & 2040/2014 dt. 30.03.2016, [12.4].

<sup>26</sup> Case No. CS (OS) No. 442/2013 before the Delhi High Court.

<sup>27</sup> *Telefonaktiebolaget LM Ericsson (Publ) v Mercury Electronics and Anr.*, CS(OS) 442/2013, Delhi High Court, Order dt. 06.03.2013.

<sup>28</sup> The court directed the customs authorities that as and when any consignment is imported by the Micromax, intimation thereof shall be given to the Ericsson and its objections, if any, thereto shall be decided under Intellectual Property Rights (Imported Goods) Enforcement Rules, 2007, *ibid*; The court also appointed local commissioner to visit Micromax's premises to inspect and collect documents indicating import and sales of various infringing mobile devices (handsets, tablets etc.) and other alleged infringing components for the last three financial years; "In any suit in which the court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or of ascertaining the market value of any property, or the amount of any mesne profits or damages or annual net profits, the court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the court" Code of Civil Procedure, 1908, Order 26 Rule 9.

<sup>29</sup> *Telefonaktiebolaget LM Ericsson (Publ) v Mercury Electronics and Anr.*, CS(OS) 442/2013, Delhi High Court, Order dt. 19.03.2013; The court fixed new interim royalty rates in its order dt. 12.11.2014.

(FRAND).<sup>30</sup> The DHC suggested Micromax to pay royalties on an ad-interim arrangement basis to the court<sup>31</sup> and decided on the royalty rates to be paid to Ericsson.<sup>32</sup>

Although the parties in March 2013 did decide to start the negotiation process afresh, no settlement could be reached.<sup>33</sup> The subsequent mediation process that was initiated till March 2014 also failed.<sup>34</sup> Micromax suggested that the mediation process failed because Ericsson on their part failed to submit license agreements with other parties.<sup>35</sup> Subsequent to such allegation Ericsson did submit the license agreements to the DHC and started to negotiate a settlement in 2014.<sup>36</sup>

While these processes were happening, in June 2013 Micromax lodged a complaint against Ericsson and submitted information before the CCI.<sup>37</sup> Micromax had also filed a revocation petition before the IPAB. The parties, however, agreed before the DHC that they shall take adjournments before IPAB.<sup>38</sup> The DHC further directed the IPAB to not pass any adverse

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<sup>30</sup> Regardless of the commencement of the negotiation process custom authorities were asked to inform Ericsson upon arrival of any consignment that belonged to Micromax, *Telefonaktiebolaget LM Ericsson (Publ) v Mercury Electronics and Anr.*, CS(OS) 442/2013, Delhi High Court, Order dt. 19.03.2013.

<sup>31</sup> “A. For phones/devices capable of GSM ? 1.25% of sale price.

B. For phones/devices capable of GPRS + GSM ? 1.75% of sale price.

C. For phones/devices capable of EDGE + GPRS + GSM ? 2% of sale price.

D. WCDMA/HSPA phones/devices, calling tablets ? 2% of the sale price.” *ibid.*

<sup>32</sup> On 12<sup>th</sup> November, 2014, before deciding on the royalty, the court went through 26 agreements between Ericsson and other Indian parties, *Telefonaktiebolaget LM Ericsson (Publ) v Mercury Electronics and Anr.*, CS(OS) 442/2013, Delhi High Court, Order dt. 12.11.2014.

<sup>33</sup> *Telefonaktiebolaget LM Ericsson (Publ) v Mercury Electronics & Anr.*, CS (OS) No. 442 of 2013, Order dt. 19.03.2013.

<sup>34</sup> *Telefonaktiebolaget LM Ericsson (Publ) v Mercury Electronics and Anr.*, CS(OS) 442/2013, Delhi High Court, Order dt. 10.04.2013; *Telefonaktiebolaget LM Ericsson (Publ) v Mercury Electronics and Anr.*, CS(OS) 442/2013, Delhi High Court, Order dt. 07.03.2014; Parties submitted before the court that the matter could not be resolved, *Telefonaktiebolaget LM Ericsson (Publ) v Mercury Electronics and Anr.*, CS(OS) 442/2013, Delhi High Court, Order dt. 15.04.2014.

<sup>35</sup> Case No. 50/2003, Competition Commission of India, Order dt. 12.11.2013, [7].

<sup>36</sup> *Telefonaktiebolaget LM Ericsson (Publ) v Mercury Electronics and Anr.*, CS(OS) 442/2013, Delhi High Court, Order dt. 12.11.2014 and Order dt. 18.09.2014.

<sup>37</sup> Competition Act, 2002, s 19 (1) (a) provides that “The Commission may inquire into any alleged contravention of the provisions .... either on its own motion or on— (a) receipt of a complaint, accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association”; The case was registered as CCI Case No. 50/2013 filed on 24<sup>th</sup> June, 2013.

<sup>38</sup> *Telefonaktiebolaget LM Ericsson (Publ) v Mercury Electronics and Anr.*, CS(OS) 442/2013, Delhi High Court, Order dt. 17.03.2015.

order against any party.<sup>39</sup> Subsequently Micromax withdrew its application for patent revocation in June, 2015.<sup>40</sup>

### **3.1.2 *Ericsson v Intex***

In this case Ericsson approached Intex suggesting that they were infringing their SEPs since 2008. Ericsson was willing to offer the technology on FRAND terms.<sup>41</sup> The negotiation process started in December 2008 and continued till March 2014.<sup>42</sup> The following provides an overall understanding of the events as it happened during those five years.

a. The negotiation process started in December, 2008.<sup>43</sup> Intex responded in January 2009 suggesting that they were not aware of the patented technology owned by Ericsson in India.<sup>44</sup>

b. Issues relating to FRAND licensing could not be resolved during the first stage of the negotiation process between January to November 2009.<sup>45</sup> Ericsson again initiated a process in December 2011 suggesting that Intex should enter into a licensing agreement.<sup>46</sup>

c. During the course of negotiation in 2012 Intex suggested that they were not involved in the manufacturing process and their role was limited to selling imported phones under the brand name “Intex”. As a result they were not liable, however, Ericsson suggested otherwise.<sup>47</sup>

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<sup>39</sup> *ibid.*

<sup>40</sup> *21st Century v Telefonaktiebolaget LM Ericsson (PUBL) and The Controller of Patents*, Intellectual Property Appellate Board, Order No. 141 of 2015 dt. 12.06.2015.

<sup>41</sup> *Telefonaktiebolaget LM Ericsson (Publ) v Intex Technologies (India) Limited*, CS (OS) No. 1045/2014, order dt. 13.03.2015, [83].

<sup>42</sup> *ibid* [8] and [26]; “...throughout the period of five years when the parties were negotiating with each other”, *ibid* [80].

<sup>43</sup> *Telefonaktiebolaget LM Ericsson (Publ) v. Competition Commission of India*, Case W.P.(C) 464/2014 & CM Nos.911/2014 & 915/2014 and W.P.(C) 1006/2014 & CM Nos.2037/2014 & 2040/2014 dt. 30.03.2016, [13.1].

<sup>44</sup> *ibid* [13.1]; “The plaintiff negotiated with the defendant under the aegis of Indian Cellular Association (“ICA”).” *ibid* [24].

<sup>45</sup> *ibid* [13.1].

<sup>46</sup> *Telefonaktiebolaget LM Ericsson (Publ) v Intex Technologies (India) Limited*, CS (OS) No. 1045/2014, order dt. 13.03.2015, [24].

<sup>47</sup> *ibid.*

d. Finally in 2013 Ericsson shared the commercial terms of the license after the NDA was executed.<sup>48</sup> Subsequent to the signing of NDA, Intex made a counter-offer which was not acceptable to Ericsson. Similarly, the portfolio licensing of 2G and 3G SEPs was deemed unreasonable by Intex.<sup>49</sup>

Intex on 23<sup>rd</sup> August, 2013, while the negotiations were still in progress, filed for revocation of patents before the IPAB with respect to five SEPs held by Ericsson.<sup>50</sup> Subsequently in 2013, Intex lodged a complaint against Ericsson under section 19 (1) (a) of the Competition Act.<sup>51</sup> Intex adopted two positions as to the patents in SEPs. While Intex challenged their validity before IPAB, before the CCI it complained that Ericsson was charging exorbitant rates for its patented technology.<sup>52</sup>

Ericsson suggested that Intex's behaviour would amount to an "unwilling licensee", which was also later on observed by the DHC.<sup>53</sup> In fact, the DHC suggested that:

[t]he defendant despite of many meetings and negotiation for the purpose of execution of a FRAND license, the defendant was evidently avoiding the same and became unwilling licensee as per its overall conduct.<sup>54</sup>

Similar to the Micromax case in April 2014 Ericsson filed a patent infringement suit against Intex.<sup>55</sup> The DHC in March, 2015, granted injunction in favor of Ericsson and restrained Intex from manufacturing, importing or selling the infringing devices in any

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<sup>48</sup> *Telefonaktiebolaget LM Ericsson (Publ) v. Competition Commission of India*, Case W.P.(C) 464/2014 & CM Nos.911/2014 & 915/2014 and W.P.(C) 1006/2014 & CM Nos.2037/2014 & 2040/2014 dt. 30.03.2016, [13.3].

<sup>49</sup> *ibid* [13.6].

<sup>50</sup> *ibid* [13.5]; *Telefonaktiebolaget LM Ericsson (Publ) v Intex Technologies (India) Limited*, CS (OS) No. 1045/2014, order dt. 13.03.2015, [27].

<sup>51</sup> Case No. 76 of 2013, Competition Commission of India.

<sup>52</sup> *Telefonaktiebolaget LM Ericsson (Publ) v Intex Technologies (India) Limited*, CS (OS) No. 1045/2014, order dt. 13.03.2015, [29].

<sup>53</sup> *ibid* [147]; See Robert P. Taylor 'Licensing in Theory and Practice: Licensor-Licensee Relationships' 53 *Antitrust L.J.* 561 1984-1985; Joseph Mueller, Mark Selwyn, and Timothy Syrett, 'The Unwarranted Attempts to Extend the "Unwilling Licensee" Concept', <[http://mlexmarketinsight.com/wp-content/uploads/2016/03/Unwilling\\_Licensee.pdf](http://mlexmarketinsight.com/wp-content/uploads/2016/03/Unwilling_Licensee.pdf)> accessed on 4 January 2017.

<sup>54</sup> *ibid* [147].

<sup>55</sup> CS (OS) No. 1045/2014 now converted to CS (COMM) 769 of 2016 before the Delhi High Court.

manner whatsoever.<sup>56</sup> Further, the DHC instructed Intex to disclose the quantum of devices sold and revenue earned from the sale of the devices in question.<sup>57</sup> The rate of royalty fixed in the case of Micromax was accepted in the instant case.<sup>58</sup>

### **3.1.3 Ericsson v iBall**

As in the other two cases the facts and situations were fairly similar in this case. The negotiation process started in 2011 and continued till 2015.

- a. In November 2011, Ericsson and iBall initiated the process of negotiation. Ericsson informed iBall about the infringement and possible ways of resolving the issue by signing a license agreement or the Global Patent Licensing agreement (GPLA) on FRAND terms.<sup>59</sup> While iBall was willing to sign the GPLA, but they wanted information about the patents infringed by them. Ericsson was not willing to divulge such information without signing the NDA.<sup>60</sup>
- b. After much negotiations and deliberations Ericsson and iBall failed to sign the NDA. There were multiple reasons ranging from onerous governing law and jurisdiction clauses.<sup>61</sup>

Ericsson claimed iBall failed to execute a mutually agreeable NDA, even after Ericsson agreed to change the jurisdiction and governing law clauses.<sup>62</sup> Further, Ericsson alleged that iBall failed to discuss the FRAND license.<sup>63</sup> iBall claimed that Ericsson had failed to share the details of infringement and forced iBall to enter into an NDA. It alleged that

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<sup>56</sup> *Telefonaktiebolaget LM Ericsson (Publ) v Intex Technologies (India) Limited*, CS (OS) No. 1045/2014, order dt. 13.03.2015, [161] and [162]; The Court instructed the customs authorities to not allow the import of mobiles infringing the patents in question; *ibid* [162].

<sup>57</sup> *ibid* [162] & [161].

<sup>58</sup> *ibid* [161].

<sup>59</sup> *Telefonaktiebolaget LM Ericsson (Publ) v M/s Best It World (India) Private Limited (iBall)*, I.A. No. 17351 of 2015 in CS (OS) 2501 of 2015, Order dt. 02.09.2015, [15].

<sup>60</sup> Order dt. 12.05.2015, Case No. 4 of 2015, Competition Commission of India, [4].

<sup>61</sup> Iball alleged that it contained onerous and strict terms such as ten years confidentiality in relation to disclosure of any information by either party, confidential information is to be shared only with an affiliated company and all disputes are to be settled by way of arbitration in Stockholm, Sweden, *ibid*, [5];.

<sup>62</sup> *ibid* [19].

<sup>63</sup> *Telefonaktiebolaget LM Ericsson (Publ) v M/s Best It World (India) Private Limited (iBall)*, I.A. No. 17351 of 2015 in CS (OS) 2501 of 2015, Order dt. 02.09.2015, [15] & [17].

Ericsson amended the confidentiality clause that prevented iBall from verifying any claim that Ericsson made about patent infringement.<sup>64</sup>

While the negotiations were on iBall approached CCI. Subsequently, Ericsson filed a patent infringement suit.<sup>65</sup> The DHC declared iBall as an unwilling licensee and expressed

“...that the defendant [iBall] has not taken any step or shown any interest for the purpose of execution of the FRAND Agreement as on the one hand the defendant is alleging that it is not infringing the suit patents of the plaintiff and on the other hand the defendant itself has filed the complaint before the CCI wherein certain admissions of the rights of the plaintiff have been made”.<sup>66</sup>

Similar to other cases, a restriction was imposed on iBall from importing devices that were infringing the patented technology.<sup>67</sup> The DHC also found that iBall was aware of the technology owned by Ericsson and therefore, granted an interim injunction based on the argument of balance of convenience and irreparable loss and injury.<sup>68</sup> The parties entered into a GPLA in October, 2015. By virtue of this GPLA iBall accepted a worldwide non-transferable and non-exclusive patent license.<sup>69</sup> The case was disposed in two months from the date of initiation.

In all of these cases, the negotiation period was marred first by the signing and non-signing of the NDA and second by the FRAND rates. As observed in Section four, these issues also became contentious for CCI as it has to decide the question of abuse of dominance at the prima facie stage. Thus, it becomes important to assess whether asking to sign an NDA was unique to India or is it a general practice in a similar situation in other

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<sup>64</sup> *ibid* [11].

<sup>65</sup> *Telefonaktiebolaget LM Ericsson (Publ) v M/s Best It World (India) Private Limited (iBall)* CS (OS) 2501 of 2015 before Delhi High Court.

<sup>66</sup> *Telefonaktiebolaget LM Ericsson (Publ) v M/s Best It World (India) Private Limited (iBall)*, I.A. No. 17351 of 2015 in CS (OS) 2501 of 2015, Order dt. 02.09.2015, [27].

<sup>67</sup> *Telefonaktiebolaget LM Ericsson (Publ) v M/s Best It World (India) Private Limited (iBall)*, I.A. No. 17351 of 2015 in CS (OS) 2501 of 2015, Order dt. 02.09.2015, [28].

<sup>68</sup> *ibid* [23] & [26].

<sup>69</sup> *Telefonaktiebolaget LM Ericsson (Publ) v M/s Best It World (India) Private Limited (iBall)*, CS(OS) 2501/2015, Order dt. 29.10.2015.

jurisdictions. Further, there is a great deal happening with FRAND rates primarily because of the debate with the royalty base. Therefore, it becomes important to take notice of how the issue of royalty base is handled.<sup>70</sup> Further, the courts in the above decisions questioned the tendency on the part of stakeholders who were the recipients of technology to delay the overall proceedings. The treatment of these issues in other jurisdiction and their overall bearing on the outcome of decisions would give us an idea about the importance of these chain of events prior to the investigation by CCI.

### **3.2 Relevancy of Issues before CCI investigation: lessons learnt from other jurisdictions**

Refusal to seek license by the implementer or any behavior that is indicative of lack of willingness to enter into a license agreement with SEP holder has been treated differently by the German courts, which granted injunctions if the SEP holder satisfied certain specific conditions.<sup>71</sup> Further, the CJEU, in *Huawei v ZTE* noted that there could be instances wherein the implementer might raise concerns of abuse of dominant position when the SEP holder exercises his statutory right to seek injunctions for patent infringement committed by an unwilling licensee.<sup>72</sup> CJEU noted that:

Indeed, the exercise of a statutory right cannot, in itself, constitute an abuse of a dominant position, for characterization as such requires other criteria to be satisfied. For that reason, it is not satisfactory to adopt, as a criterion of such an abuse, the notion of the infringer's 'willingness to negotiate',

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<sup>70</sup> The court have in the interim arrangement orders approved of payment of royalties based on the value of the downstream product as the base whereas CCI has favored using the smallest salable patent-practising component. *Telefonaktiebolaget LM Ericsson (Publ) v Mercury Electronics & Anr*, CS (OS) No. 442 of 2013, Order dt. 12.11.2014; Case No. 50/2003, Case No. 76/2013, Case No. 4 of 2015, Competition Commission of India.

<sup>71</sup> The Orange Book Standard required the implementer to make an offer to obtain license on reasonable terms and pay royalties to the patent holder or into an escrow account. See Federal Supreme Court (Bundesgerichtshof) May 6, 2009- Case No. KZR 39/06

<sup>72</sup> *Huawei Technologies co. Ltd v ZTE Corp., ZTE Deutschland GmbH*, Court of Justice of the European Union (CJEU), Case C-170/13, ECLI:EU:C:2015:477, 16 July 2015, [38]

since this may give rise to numerous interpretations and provide the infringer with too wide a freedom of action.<sup>73</sup>

The CJEU laid down guidelines that a SEP holder needs to comply with in order to avoid a scenario wherein application for injunctive relief is regarded as abuse of dominance.<sup>74</sup> Accordingly, the SEP holder is required to notify the implementer in writing about the infringement committed by the implementer.<sup>75</sup> The implementer is then required to demonstrate his willingness to conclude a licensing agreement on FRAND terms.<sup>76</sup> Further, the SEP holder is required to provide a written offer to provide license on FRAND terms that must also specify the amount of royalty and method of calculating the same.<sup>77</sup> The implementer is then expected to respond to that offer in good faith and in accordance with commercial practices and in particular ensuring that there is no undue delay.<sup>78</sup> In the event that the implementer is not in agreement with the offer made by the SEP holder, it could provide a counter-offer that is on FRAND terms.<sup>79</sup> If the implementer is already employing the underlying SEP then it is expected to provide adequate security for its past and future use in the form of bank guarantee or by depositing money.<sup>80</sup> In the event that there is no agreement between the implementer and SEP holder then an independent third party may be requested to determine the royalty.<sup>81</sup> The CJEU also stated that the implementer cannot be restricted from questioning the validity or essentiality of the SEP during the negotiation of the license or in the future.<sup>82</sup> The developments in Europe clearly indicate that implementers and SEP holders are required to negotiate the license on FRAND terms and unwillingness on the part of the implementer to do so could enable the SEP holder to exercise his statutory right without any fear of being accused of abusing its dominant position.

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<sup>73</sup> Ibid [38]

<sup>74</sup> Wilko van Weert, et al., 'CJEU takes a stance on standard-essential patents, injunctions and abuse of dominance' [2016] 11 Journal of Intellectual Property Law & Practice 76.

<sup>75</sup> *Huawei Technologies co. Ltd v ZTE Corp., ZTE Deutschland GmbH*, Court of Justice of the European Union (CJEU), Case C-170/13, ECLI:EU:C:2015:477, 16 July 2015, [61].

<sup>76</sup> Ibid [63].

<sup>77</sup> Ibid.

<sup>78</sup> Ibid [65].

<sup>79</sup> Ibid [66].

<sup>80</sup> Ibid [67].

<sup>81</sup> Ibid [68].

<sup>82</sup> Ibid [69].



The DHC recognized the relevance of the principles laid down in *Huawei v ZTE in India*.<sup>83</sup> Interestingly, the DHC observed in *Ericsson v Intex* and *Ericsson v iBall* that the conduct of the implementers indicated that they were unwilling to enter into a licensing agreement.<sup>84</sup> The timeline of the negotiations between the SEP holder and the three implementers indicate that the implementers took a long time since they prolonged the negotiations to more than 50 months as indicated in the chart below.



It is also relevant to note that during the prolonged negotiations between SEP holder and implementers there were no efforts to provide any guarantee or deposit money to assure the SEP holder. Instead, the implementers continued to use, import and manufacture the underlying SEP without any restriction.<sup>85</sup> This demonstrates that the SEP holder exercised patience and made efforts to negotiate licenses in good faith despite having

<sup>83</sup> *Telefonaktiebolaget LM Ericsson (Publ) v. Competition Commission of India*, Case W.P.(C) 464/2014 & CM Nos.911/2014 & 915/2014 and W.P.(C) 1006/2014 & CM Nos.2037/2014 & 2040/2014 dt. 30.03.2016 [195].

<sup>84</sup> *Telefonaktiebolaget LM Ericsson (Publ) v Intex Technologies (India) Limited*, CS (OS) No. 1045/2014, order dt. 13.03.2015 [136]; *Telefonaktiebolaget LM Ericsson (Publ) v M/s Best It World (India) Private Limited (iBall)*, I.A. No. 17351 of 2015 in CS (OS) 2501 of 2015, Order dt. 02.09.2015 [27].

<sup>85</sup> This changed with the intervention of the courts at a later stage, *Telefonaktiebolaget LM Ericsson (Publ) v Mercury Electronics and Anr.*, CS(OS) 442/2013, Delhi High Court, Order dt. 06.03.2013.

explicit knowledge about the infringement committed by the implementers. Further, implementers objected to signing of NDA which is a standard practice in the industry. Licensing negotiations involves sharing of sensitive information between two parties and it is only possible to carry out negotiations if parties are assured that such information is kept confidential.<sup>86</sup> It is pertinent to note that NDA has never been raised as antitrust issue in any other part of the world apart from the three complaints raised before the CCI.

#### **4. Processes followed at the time of initial investigation by the CCI**

Under section 7 of the Competition Act the Commission has been set up in India consisting of a Chairperson and six other members.<sup>87</sup> The Director General (DG) is appointed under Section 16 of the same Act and primarily helps the Commission in the process of inquiry of any alleged contravention of the provisions of the Act. The Commission on its own accord may appoint a secretary and any other officers.<sup>88</sup> Duties and Powers of the Commission have been assigned under Chapter IV of the Act.<sup>89</sup>

##### **4.1 What initiates the process of investigation – How does it start?**

The source of complaint under section 19(1)(a) of the Competition Act can originate from either the informant, the central government, state government, statutory authority or it can also be considered *suo moto* by the Commission.<sup>90</sup> Once the complaint has been received, the Commission including the Chairperson with the help of the members of the CCI would decide whether there is a prima facie case of abuse of dominance. Having been satisfied, the Commission can ask the Director General to start a detailed investigation of the case under section 26(1) or dismiss the case under Section 26(2) of the Competition Act.<sup>91</sup> Section 19 does not require the Commission to notify the informant or the party

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<sup>86</sup> Michael J. Lennon, 'Drafting Technology Patent License Agreements' (2<sup>nd</sup> edn, Wolters Kluwer 2016).

<sup>87</sup> Competition Act, 2002, s 8.

<sup>88</sup> *ibid* s.17.

<sup>89</sup> *ibid* s.18-39.

<sup>90</sup> *ibid*, s.19; Competition Commission of India (General) Regulations, 2009, regs 10-13, 23 and 49; CCI, 'How to File Information?'. <[http://cci.gov.in/sites/default/files/cci\\_pdf/HowToFileInformation.pdf](http://cci.gov.in/sites/default/files/cci_pdf/HowToFileInformation.pdf)> accessed 28 December 2016.

<sup>91</sup> Decision made based on Section 26(2) is made appealable, Competition Act, 2002, s. 53B (1) & 53A (1) (a).

against whom the complaint has been made or to any other person.<sup>92</sup> While there is no obligation on the part of the Commission to either notify or hear the parties at the stage when he receives the information, the Commission is free to call ‘any person’ or any materials that would assist him in deciding the position of abuse of dominance.<sup>93</sup>

#### **4.2 Prima facie evidence: the jurisprudence so far in non-ICT cases**

While the case in hand is not a judgement concerning the ICT sector, the SC in India has offered a broad understanding of the issues that are related to the stage of prima facie evidence.<sup>94</sup> Following the formal requirement of informing the Commission under Section 19(1) read along with section 26(1), Jindal Steel & Powers Ltd (JSPL) alleged a case of abuse of dominance against Steel Authority of India (SAIL).<sup>95</sup> Taking cognizance of the information shared, the Commission asked the parties – the informant and the opposite party to furnish additional information.<sup>96</sup> The Commission finding no justification in giving SAIL an additional six weeks to file its comments, formed the opinion that there was a prima facie case against SAIL and forwarded the matter to the DG for further investigation.<sup>97</sup> In the process, there was a detailed discussion of the case with the Commission considering entire relevant material and records that were made available at the preliminary stage.<sup>98</sup> Further the Commission also heard the submission

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<sup>92</sup> *Competition Commission of India v Steel Authority of India Ltd. and Anr.*, (2010) 10 SCC 744 [11].

<sup>93</sup> Under regulation 17(2), the Commission has the power to call not only the informant but any party including the affected party, Competition Commission of India (General) Regulations, 2009, regs. 17 (2) & 44 (1).

<sup>94</sup> *Competition Commission of India v Steel Authority of India Ltd. and Anr.*, (2010) 10 SCC 744.

<sup>95</sup> JSPL invoked the provisions of Section 19 read with Section 26 (1) of the Competition Act, 2002 by providing information to the CCI alleging that SAIL had inter alia entered into an exclusive supply agreement with Indian Railways, for supply of long rails. JSPL alleged that SAIL had abused its dominant position in the market and deprived others of fair competition and therefore, acted contrary to Section 3 (4) and 4 (1) of the Competition Act, Case No. 11 of 2009, Competition Commission of India.

<sup>96</sup> After receiving the complaint, the Commission had a meeting with representatives of JSPL and also fixed a conference with representatives of SAIL. On 19th November, 2009 a notice was issued to SAIL enclosing all information submitted by JSPL directing SAIL to submit its comments by 8<sup>th</sup> December, 2009 in respect of the information received by the Commission. On 8<sup>th</sup> December when the matter was heard, SAIL wanted an extension of time by six weeks to file its comments and for conference with the Commission. However, without hearing SAIL, the Commission passed an order under Section 26(1) on 08.12.2009 directing the DG to investigate the case. (2010) 10 SCC 744 [8]; Order dt.20.12.2011, Case No. 11/2009, Competition Commission of India [3], <<https://indiankanoon.org/doc/64217260/>> accessed on 28 December 2016.

<sup>97</sup> *ibid* [3].

<sup>98</sup> *ibid*; (2010) 10 SCC 744 [8].

made by the representatives of JSPL.<sup>99</sup> Only after going through this stage, the Commission found a prime facie case against the opposite party. SAIL contested the direction of the Commission and filed an appeal before the Competition Appellate Tribunal.<sup>100</sup> The Commission questioned the maintainability of the appeal suggesting that the order instructing the DG to conduct an investigation “...was a direction simpliciter to conduct investigation and thus was not an order appealable within the meaning of Section 53A of the [Competition] Act”.<sup>101</sup> It is important to note that the Competition Appellate Tribunal held that appeal as per Section 53A of the Act was maintainable owing to the principles of natural justice.<sup>102</sup>

While deciding whether an appeal can be maintained arising out of a preliminary direction given by the Commission, the SC provided some insights about prima facie evidence. They looked at the nature of the direction, the provision of appeal and the meaning associated with prima facie evidence.

#### ***4.2.1 The nature of the direction***

Following the broad contours of jurisprudence related to administrative law, the Commission at the time of giving out the prima facie opinion should record some of the reasons before framing an opinion.<sup>103</sup> This is independent of the stage of investigation. However, the SC suggested that the act of passing on the prima facie evidence to DG for

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<sup>99</sup> Order dt.20.12.2011, Case No. 11/2009, Competition Commission of India [3], <<https://indiankanoon.org/doc/64217260/>> accessed on 28 December 2016.

<sup>100</sup> Order dt.20.12.2011, Case No. 11/2009, Competition Commission of India [4], <<https://indiankanoon.org/doc/64217260/>> accessed on 28 December 2016.

<sup>101</sup> (2010) 10 SCC 744 [9].

<sup>102</sup> Competition Act, 2002, s 53A; SAIL also suggested that, since section 53A suggests that appeal is allowed on any direction issued or decision made or order passed by the Commission. The contention was that use of ‘or’ in the provision would also include the direction of the Commission to the DG under Section 26(1). Hence this direction would be appealable, (2010) 10 SCC 744 [29]; This argument was not considered by the Supreme Court. The court suggested that the Statute has clearly laid down under section 53A, the grounds of appeal and there, unlike 26(2), section 26(1) has been omitted. It went on to say “...right to appeal is a creation of statute and it does require application of rule of plain construction. Such provision should neither be construed too strictly nor too liberally, if given either of these extreme interpretations, it is bound to adversely affect the legislative object as well as hamper the proceedings before the appropriate forum”, (2010) 10 SCC 744 [35].

<sup>103</sup> This is contrary to the situations where the Commission acts in the adjudicatory capacity. Competition Act, 2002, s 19, 20, 26, 27, 31, 33; (2010) 10 SCC 744 [24]; The court went on to say “...Even in a direction... the Commission is expected to [support his action] based on some reasoning ... not detailed. [However] when “...decisions and orders, which are not directions simpliciter and determining the rights of the parties should be well reasoned..” (2010) 10 SCC 744.

carrying out further investigation is nothing more than a departmental enquiry and inquisitorial in nature.<sup>104</sup> This is purely an administrative action and not adjudicatory in nature.<sup>105</sup>

The enquiry based on the information provided by informant would not bring about any civil consequences for the opposite party. This argument continued in a recent decision of the Madras High Court as well.<sup>106</sup> Further the Section 57 of the Competition Act read with regulation 35 provides assurance that strict confidentiality must be maintained by the Commission.<sup>107</sup>

The SC suggested that unlike the decision under 26(1), the decision under 26(2) is appealable because it is a final order thereby putting an end to the investigation that commenced under Section 26(1).<sup>108</sup>

#### ***4.2.2 Notice and application of natural justice***

The contention of SAIL was that following the principle of natural justice the Commission should notify the parties about the prima facie stage.<sup>109</sup> The SC was of the opinion that the provisions do not suggest that notice is an absolute requirement under 26(1).<sup>110</sup> Comparing with the requirement of notice under 26(2), the SC suggested that there was no reason to assume the requirement of notice. Going by practice, the legislature has every intention of including any such requirement explicitly in the provision itself.<sup>111</sup> While

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<sup>104</sup> “Investigating power granted to the administrative agencies normally is inquisitorial in nature, *Krishna Swami v Union of India* [1992] 4 SCC 605.

<sup>105</sup> (2010) 10 SCC 744 [28].

<sup>106</sup> *Chettinad International Coal v. The Competition Commission of India and others*, W.P.No.7233 of 2016, Madras High Court, Order dt. 29.03. 2016; In this case a writ petition was filed questioning whether an order made under Section 26(1) can be challenged, [18]. Under Art. 226 of the Indian Constitution a writ remedy is an extra –ordinary power that is vested with the High Court that examine the correctness or orders passed by forums subordinate to it [21].

<sup>107</sup> Competition Act, 2002, s 57; Competition Commission of India (General) Regulations, 2009, reg 35.

<sup>108</sup> (2010) 10 SCC 744 [28].

<sup>109</sup> (2010) 10 SCC 744 [53].

<sup>110</sup> (2010) 10 SCC 744 [61].

<sup>111</sup> *Ibid*; Another example is the requirement of notice under Regulation 14(7)(f) and regulation 17(2). ). The secretary of the Commission is empowered to serve the notice of the date of the ordinary meeting of the Commission to consider the information or reference or document to decide if there exists a prima facie case, Competition Commission of India (General) Regulations, 2009, reg 14 (7) (f); The Commission may invite the information provider and such other person as is necessary for the preliminary conference, Competition Commission of India (General) Regulations, 2009, reg 17 (2).

there is a discretionary power with the Commission to call the parties at the prima facie stage that however does not become an:

...absolute proposition of law that in all cases, at all stages and in all event the right to notice [a] hearing is a mandatory requirement of principles of natural justice... Different laws have provided for exclusion of principles of natural justice at different stages, particularly, at the initial stage of the proceedings and such laws have been upheld by this court. [Furthermore] such exclusion is founded on larger public interest and is for compelling and valid reasons, the courts have declined to entertain such a challenge.<sup>112</sup>

As explained earlier, since the act of forming prima facie opinion and passing onto the DG for detailed investigation is a departmental function and preliminary in nature, there is no such requirement for the opportunity to be provided to the parties for being heard. To deal with the complaint at the initial stage in an expeditious manner the requirement of notice is not explicit under the provision and there would be no application of natural justice in this case.<sup>113</sup> The direction given by the Commission under 26(1) is in the nature of 'preparatory measures' not 'decision making process'.<sup>114</sup> While we will consider the application of natural justice and practice followed by the Commission in the next subsection, it important to qualify the statement that considers the stage of prima facie evidence as a preparatory measure.

Even though it is termed as the preparatory measure stage, it is important to understand to what extent does the Commission rely on the information it receives from an informant. The below mentioned table suggests that rarely does the Commission take up any matter to judge abuse of dominance or receives information from government or statutory agencies. In the last seven years (divided into two segments), it is clear that the information received from the informant is deemed to be the most important source. This being the case it becomes imperative to understand the overall procedure followed by the Commission.

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<sup>112</sup> (2010) 10 SCC 744 [63].

<sup>113</sup> *ibid* 27.

<sup>114</sup> *ibid* 27.

| Years   | Suo motu enquiries | References received from Central / State Government / Statutory Authorities | Information received under section 19 (1) by the informant |
|---------|--------------------|---|--|
| 2009-10 | 0                  | 0   | 32   |
| 2010-11 | 5                  | 1   | 77   |
| 2011-12 | 0                  | 4   | 93   |
| 2012-13 | 6                  | 2   | 76   |

Table 1<sup>115</sup>

The trend observed in the above table is similar for the subsequent three years (Table 2), with numbers showing extraordinary reliance on information filed to the Commission. The other numbers still continue to be less.

| Years   | Suo motu enquiries | References received from Central / State Government / Statutory Authorities | Information received under section 19 (1) By the informant |
|---------|--------------------|---|--|
| 2013-14 | 5                  | 8   | 102  |
| 2014-15 | 11                 | 7   | 110  |
| 2015-16 | 1                  | 3   | 117  |

Table 2

As a continuation of the above information, the number of cases that has been finally passed onto the DG for detailed investigation is lot less than what was actually received by the Commission. This evidence increases the role from being just a preparatory stage to a major decision making process.<sup>116</sup> The percentage of cases going to the DG suggests that a great extent of filtration happens at the prima facie stage before it reaches the DG

<sup>115</sup> Table 1 and 2 consists of cases under section 19(1) when either the Commission has received the information from the Central/State Govt/statutory authorities and the informant.

<sup>116</sup> G. R. Bhatia, 'Ex-Parte Prima Facie order by the Competition Commission of India – A Critique' (2013) Chartered Secretary, 768.

for final investigation.<sup>117</sup> The percentage of such cases is limited to only 34%, which raises the importance of prima facie stage and makes it a crucial stage of investigation.<sup>118</sup> This also means that at the primary stage almost 65 % cases are dismissed under section 26(2), which would also indicate detailed scrutiny of matters coming to Commission through the informant. Equally, before dismissing the cases it is important to carefully examine these complaints. The numbers till 2013 shows the following:

| Total number of cases considered | Number of cases in which an opinion is formed under Section 26 (2) | Number of cases in which an opinion is formed under Section 26 (1) and the matter is referred to the DG | Number of cases in which the DG gave an adverse finding | Number of cases in which the DG did not find any contravention | Number of cases in which orders were passed under Section 27 |
|----------------------------------|--|---|---|--|--|
| 223                              | 147  | 76  | 57  | 19   | 19   |

Table 3

There however, exists some inconsistencies with the above table and one that has been gathered from the annual reports published by the CCI.

While the total number of cases (Table 4) reported to the Commission to the total number of cases passed onto the DG is different, there is no doubt about the strong filtration process that happens at the preparatory stage. Only 39% of the actual cases received by the Commission actually get transferred to the DG for detailed investigation, thereby about 61% of the total complaints are dismissed at the prima facie stage and after the hearing of the Commission.

<sup>117</sup> Infra Annexures.

<sup>118</sup> G. R. Bhatia, 'Ex-Parte Prima Facie order by the Competition Commission of India – A Critique' (2013) Chartered Secretary, 768.



| Year    | Total number of cases considered | Number of cases in which an opinion is formed under Section 26 (2) <sup>119</sup> | Number of cases in which an opinion is formed under Section 26 (1) and the matter is referred to the DG <sup>120</sup> | Number of cases in which the DG gave an adverse finding | Number of cases in which the DG did not find any contravention 26 (6) | Number of cases in which orders were passed under Section 27 <sup>121</sup> |
|---------|----------------------------------|---|--|---|---|---|
| 2009-10 | 81                               | 6   | 23   |   | 7   |   |
| 2010-11 | 76                               | 46/47*  | 70   |   | 8   | 1   |
| 2011-12 | 92                               | 51  | 38   |   | 37  | 30  |
| 2012-13 | 94                               | 51  | 32   |   | 14  | 30 or 18  |
| 2013-14 | 115                              | 72  | 50   |   | 8   | 13  |
| 2014-15 | 128                              | 73  | 41   |   | 70  | 80  |
| 2015-16 | 121                              | 96  | 23   |   | 17  | 14  |
| Total   | 707                              | 395   | 277  |   | 225   | 94  |

Table 4<sup>122</sup>

Although the SC in SAIL, opined that there is no need to meet the requirement of natural justice, in the same case the Commission did inform the opposite party about the

<sup>119</sup> “The Director General shall, on receipt of direction under sub-section (1), submit a report on his findings within such period as may be specified by the Commission”, Competition Act, 2002, s 26 (2).

<sup>120</sup> “On receipt of a complaint or a reference from the Central Government or a State Government or a statutory authority or on its own knowledge or information, under section 19, if the Commission is of the opinion that there exists a prima facie case, it shall direct the Director General to cause an investigation to be made into the matter”, Competition Act, 2002, s 26 (1).

<sup>121</sup> “Orders by Commission after inquiry into agreements or abuse of dominant position.—Where after inquiry the Commission finds that any agreement referred to in section 3 or action of an enterprise in a dominant position, is in contravention of section 3 or section 4, as the case may be, it may pass all or any of the following orders, namely...”, Competition Act, 2002, s 27.

<sup>122</sup> Annual Report 2015-16, CCI, 13, <<http://www.cci.gov.in/sites/default/files/annual%20reports/annual%20report%202015-16.pdf>> accessed on 24 December 2016.

complaint lodged by the informant. In fact, the opposite party was also given the opportunity to submit documents in relation to the information filed with the Commission. The first meeting that was scheduled to happen on 27<sup>th</sup> October 2008 was deferred at the request of the informant to furnish additional information.<sup>123</sup> On the same note the Commission directed SAIL to submit comments and a notice was served to SAIL enclosing all information that was submitted by the informant.<sup>124</sup> The prayer of SAIL to extend the time to file its comments was declined by the Commission.<sup>125</sup> It is evident that contrary to the idea of what SC suggested, the broad spectrum of natural justice has been followed by the Commission i.e. notification and giving the opposite party the chance to present its case – *Audi alteram partem*.<sup>126</sup> For instance, the Madras High Court referred to the CCI hearing both the parties before coming to any conclusion at the prima facie stage.<sup>127</sup> CCI had found prima facie case of abuse of dominance and referred to the DG for further investigation. Interestingly, in the same case the Madras High Court raised that the plea of natural justice was never argued before it.<sup>128</sup> If the parties had done so, then the High Court could have decided the issue of natural justice by exercising its extraordinary jurisdiction. Therefore, with this plea in place the court could have considered the case in a different way.

The DHC in the *CCI v Ericsson* case also looked at whether orders passed under S. 26(1) would come under Art. 226 for judicial review.<sup>129</sup> The DHC agreed that the scope of Article 226 is very wide,<sup>130</sup> but there are limitations as to the involvement of the High Court.<sup>131</sup> The question of judicial review would arise if the prima facie opinion formed by the CCI

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<sup>123</sup> (2010) 10 SCC 744 [8].

<sup>124</sup> *ibid* [8].

<sup>125</sup> *ibid* [8].

<sup>126</sup> *Audi Alteram partem* states that a decision cannot stand unless the person directly affected by it was given a fair opportunity both to state his case and to know and answer the other side's case, *R v Chief Constable of North Wales Police, ex p Evans* (1982) 1 WLR 1155 (HL); An order which infringes a fundamental freedom passed in violation of the audi alteram partem rule is a nullity, *Nowabkhan Abbaskhan v State of Gujarat*, AIR 1974 SC 1471.

<sup>127</sup> *Chettinad International Coal v. The Competition Commission of India and others*, W.P.No.7233 of 2016, Madras High Court, Order dt. 29.03. 2016.

<sup>128</sup> *ibid* [32].

<sup>129</sup> *Telefonaktiebolaget LM Ericsson (Publ) v. Competition Commission of India*, Case W.P.(C) 464/2014 & CM Nos.911/2014 & 915/2014 and W.P.(C) 1006/2014 & CM Nos.2037/2014 & 2040/2014 dt. 30.03.2016.

<sup>130</sup> *ibid* [68]; *Dwarka Nath v. Income Tax Officer*, 1965 57 ITR 349 SC.

<sup>131</sup> *ibid* [70]; *State of A.P v. P.V Hanumantha Rao*, 2003 10 SCC 121; *Tata Cellular v. Union of India*, AIR 1996 SC 11.

is done in a malafide way and ex-facie perverse. Further, availability of an alternative remedy of appeal would not deny the party of an application under Article 226.<sup>132</sup>

### **4.2.3 The scope of natural justice in the ICT sectors**

While the *SAIL* and the Madras High Court decision in the *Chettinad* case talked about the statutory non-requirement of notice and non-informing the parties, the practice of the Commission in the ICT cases have been different. So far, the three cases considered by the Commission whilst deciding prima facie case for abuse of dominance reflects a different position than what has been suggested in the cases mentioned above.<sup>133</sup> In all of the three cases regardless of not having a statutory requirement of intimating the parties, the Commission has been accepting submissions from either the informants or the opposite party or from both parties.<sup>134</sup> This practice goes beyond just receiving the form from the informant, which acts as a primary document.<sup>135</sup> By asking for additional information and allowing submissions made by the advocates in the prima facie stage, the hearing arranged by the Commission is not limited to a departmental enquiry where no intimation or notification is necessary as per the statutory provision.<sup>136</sup> Even in the form that is used for filing the information at the prima facie stage, there is a column asking for name and address of the counsel or other authorized person.<sup>137</sup> Although there is no such requirement under the statute to inform or ask for further submissions, asking about such details is indicative of the fact that there could be further opportunity provided to the

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<sup>132</sup> *Telefonaktiebolaget LM Ericsson (Publ) v. Competition Commission of India*, Case W.P.(C) 464/2014 & CM Nos.911/2014 & 915/2014 and W.P.(C) 1006/2014 & CM Nos.2037/2014 & 2040/2014 dt. 30.03.2016 [81].

<sup>133</sup> Case No. 50/2013 pursuant to information filed by *Micromax Informatics Limited*, Case No. 76/2013 pursuant to information filed by *Intex Technologies (India) Limited*, Case No. 04 of 2015 pursuant to information filed by *M/s Best IT World (India) Private Limited (iBall)*, all against *Telefonaktiebolaget LM Ericsson (Publ)*, Competition Commission of India.

<sup>134</sup> Case No. 50/2003, Competition Commission of India, Order dt. 12.11.2013 [10]; Case No. 76/2013, Competition Commission of India, Order dt. 16.01.2014 [10]; Case No. 04 of 2015, Competition Commission of India, Order dt. 12.05.2015 [7].

<sup>135</sup> CCI, 'HOW TO FILE INFORMATION?'

<[http://cci.gov.in/sites/default/files/cci\\_pdf/HowToFileInformation.pdf](http://cci.gov.in/sites/default/files/cci_pdf/HowToFileInformation.pdf)> accessed 28 December 2016.

<sup>136</sup> Infra 4.3 & Annexures; Competition Commission of India (General) Regulations, 2009, regs 17 (2) & 44 (1).

<sup>137</sup> CCI, 'HOW TO FILE INFORMATION?'

<[http://cci.gov.in/sites/default/files/cci\\_pdf/HowToFileInformation.pdf](http://cci.gov.in/sites/default/files/cci_pdf/HowToFileInformation.pdf)> accessed 28 December 2016.

parties who are involved in the case. Further, this form is not an outcome of a schedule as one observes in other situations, which essentially gives enough freedom to the Commission to engage parties, while coming to any decision at the prima facie stage.<sup>138</sup> Therefore, the process has somewhat become quasi-adjudicatory at least in the ICT sector, which is a shift from what is expected as per the decision in the *SAIL* case.

### **4.3 Nature of evidence considered and prima facie stage in the ICT sector**

One of the earlier cases in the ICT sector involved Micromax and Ericsson. Micromax filed an application under section 19(1) (a) suggesting abuse of dominance on the part of Ericsson.<sup>139</sup> Micromax, the informant in this case suggested that the opposite party, Ericsson demanded unfair, discriminatory and exorbitant royalty for its patented technology (essential GSM patents).<sup>140</sup> It was suggested that the royalty demanded by Ericsson was excessive in comparison to what was expected from other similar parties for the same technology.<sup>141</sup> The initial notice received from the opposite party suggested the use of essential GSM technology should be patented on FRAND terms, although there were no details provided as to the nature of the patents infringed by the informant.<sup>142</sup> The informant alleged that the terms of FRAND licences were revealed only<sup>143</sup> after signing the NDA and this was after almost 16 months since this request was made by the informant in November 2012.<sup>144</sup> The information filed by the informant suggested that the opposite party abused its position of dominance, since there was no alternative technology. They further claimed that the royalty rate was not based on the technology that was used in the mobile phone instead was based on the final value of such phone.

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<sup>138</sup> Form I in Schedule II under Competition Commission of India (Procedure in regard to the Transaction of Business, etc.) Regulations, 2011.

<sup>139</sup> Case No. 50/2003, Competition Commission of India, Order dt. 12.11.2013.

<sup>140</sup> *ibid* [2], [3] & [8].

<sup>141</sup> *ibid* [2].

<sup>142</sup> *ibid* [3].

<sup>143</sup> Micromax made a request for details of the FRAND license in the month of July, 2011. A Non-Disclosure Agreement was executed on 16.01.2012. The terms of the FRAND licences were disclosed to the Micromax on 05.11.2012, *ibid* [4].

<sup>144</sup> Ericsson thereafter on 4th March, 2013, filed a patent infringement suit, *Telefonaktiebolaget LM Ericsson (Publ) v Mercury Electronics & Anr*, CS (OS) No. 442/2013, Delhi High Court. An ex parte interim order against Micromax was passed, *Telefonaktiebolaget LM Ericsson (Publ) v Mercury Electronics & Anr*, CS (OS) No. 442 of 2013, Order dt. 06.12.2013. As per an interim arrangement Micromax had deposited 29.45 crores towards payment of royalty as on 31.05.2013, Case No. 50/2003, Competition Commission of India, Order dt. 12.11.2013 [7].

Therefore, there was a vast difference in the royalty that was charged for a smart phone in comparison to an ordinary phone. The informant suggested that use of NDA only fructify its claim that different rates of royalty may have been charged from different parties.<sup>145</sup>

Ericsson on its part through written submissions suggested that the informant has been inconsistent in its act.<sup>146</sup> Ericsson alleged that Micromax had agreed to pay royalty before the DHC and at the time of interim settlement. However, Micromax alleged that the royalty rates were exorbitant when they filed a complaint before CCI.<sup>147</sup> Ericsson also questioned the role and jurisdiction of the Commission in deciding the rate of royalty and suggested that merely seeking injunction would not amount to abuse of dominance.<sup>148</sup>

After considering the submissions made by the parties the Commission ruled that prima facie the status of Ericsson would be dominant in the relevant market of GSM and CDMA.<sup>149</sup> Owing to the number of patents and the nature of technology, Ericsson would be in a position to exercise dominance over its present and prospective licensees.<sup>150</sup> Since the claim of different royalty rates were not refuted by the opposite party, the Commission suggested violation of FRAND terms on the part of Ericsson. While looking at the royalty rates the Commission suggested that the rates should be connected to the patented product and not to the value of the phone.<sup>151</sup> Thus, “charging of two different license fees per unit phone for use of the same technology prima facie is discriminatory and also reflects excessive pricing vis-à-vis high cost phones”.<sup>152</sup> Based on these arguments the Commission found the prima facie case Ericsson and instructed the DG to carry out a detailed investigation.<sup>153</sup>

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<sup>145</sup> Case No. 50/2003, Competition Commission of India, Order dt. 12.11.2013 [8].

<sup>146</sup> *ibid*.

<sup>147</sup> *Telefonaktiebolaget LM Ericsson (Publ) v Mercury Electronics & Anr*, CS (OS) No. 442 of 2013, Order dt. 19.03.2013; Case No. 50/2003, Competition Commission of India, Order dt. 12.11.2013.

<sup>148</sup> *Telefonaktiebolaget LM Ericsson (Publ) v Competition Commission Of India & Another* W.P.(C) No. 464/2014.

<sup>149</sup> Case No. 50/2003, Competition Commission of India, Order dt. 12.11.2013.

<sup>150</sup> *ibid* [16].

<sup>151</sup> CCI favored a royalty base based on smallest saleable patent practicing unit (SSPPU) as opposed to entire market value rule (EMVR), *ibid* [17].

<sup>152</sup> *ibid* [17].

<sup>153</sup> *ibid* [19] & [20].

In a similar situation involving Ericsson and Intex technologies, Intex filed the information to the Commission suggesting abuse of dominance. Similar to Micromax, they claimed that Ericsson was demanding exorbitant royalty rates and used unfair licensing terms in the GPLA.<sup>154</sup> For instance, the jurisdiction for GLPA was limited to Sweden.<sup>155</sup> In response, Ericsson proposed a modified NDA to be governed under the laws of Singapore.<sup>156</sup> Further, the informant Intex claimed that Ericsson failed to share the commercial terms and royalty payments on the ground of an NDA.<sup>157</sup> This was after Ericsson claimed that they offered a broadly uniform rate to similar licensees.<sup>158</sup> Intex alleged that Ericsson compelled to sign an NDA before providing details of infringement.<sup>159</sup> Therefore, Intex claimed that there was a strong possibility that royalty rates were excessive and discriminatory, thereby raising the doubt of royalty stacking and patent hold-up.<sup>160</sup> Similar to the prima facie opinion formed in the case of Micromax and citing similar grounds the Commission found a case of abuse of dominance.<sup>161</sup> In clear terms the Commission said that “NDA thrust upon the consumers by the opposite party strengthens this doubt after NDA, each of the user of SEPs is unable to know the terms of royalty of other users.”<sup>162</sup> This will be going against the “...spirit of FRAND terms”.<sup>163</sup> Similar to the previous two cases and mostly on similar grounds the Commission found a prima facie case of abuse in case of *iBall v Ericsson*.<sup>164</sup> In addition to the other grounds provided in the GPLA, the provision of the jurisdiction of arbitration was only limited to Sweden.<sup>165</sup>

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<sup>154</sup> Case No. 76/2013, Competition Commission of India, Order dt. 16.01.2014 [6]

<sup>155</sup> *ibid* [6].

<sup>156</sup> *Telefonaktiebolaget LM Ericsson (Publ) v. Competition Commission of India*, Case W.P.(C) 464/2014 & CM Nos.911/2014 & 915/2014 and W.P.(C) 1006/2014 & CM Nos.2037/2014 & 2040/2014 dt. 30.03.2016 [13.2].

<sup>157</sup> Case No. 76/2013, Competition Commission of India, Order dt. 16.01.2014 [7].

<sup>158</sup> *ibid* [7].

<sup>159</sup> *ibid* [7].

<sup>160</sup> *ibid* [8].

<sup>161</sup> *ibid* [16].

<sup>162</sup> *ibid* [17].

<sup>163</sup> *ibid* [17].

<sup>164</sup> Case No. 04/2015, Competition Commission of India, Order dt. 12.05.2015.

<sup>165</sup> *iBall* was also concerned with (i) not being provided with details; (ii) the threat of patent infringement proceedings; (iii) the attempt to coax *iBall* to enter into a “one-sided and onerous NDA”; (iv) tying and bundling patents; (v) demanding unreasonably high royalties, *ibid*.

### 4.3.1 Nature of information

There is no embargo on the nature of the information, which the informant provides in the first place. The form used for filing the information amongst other details include the following relevant fields: “Introduction/ brief of the facts giving rise to filing of the information”; “Jurisdiction of CCI”; “Details of alleged contravention of the provisions of the Competition Act, 2002”; “Detailed facts of the case”.<sup>166</sup> The Act suggests that the Commission can call for any other relevant documents or persons.<sup>167</sup> While there are existing debates surrounding the grounds considered by the Commission at the stage of deciding the prima facie case of abuse<sup>168</sup>, equally the grounds portrayed in the previous section<sup>169</sup> could be categorized as relevant information and the Commission can consider them at the prima facie stage. Looking at the extent of the investigation of information filed at the initial stage and the subsequent filtration process, the chain of events at the time prior to the CCI investigation hold equal importance.<sup>170</sup> Going by the nature of the submissions presented by the opposite party at least in the *Micromax v Ericsson* case, there is no reference to the chain of events that happened before the CCI received the complaint from Micromax alleging abuse of dominance.<sup>171</sup> We also need to consider that so far the number of cases in the ICT sector that have been taken up by the CCI are few.

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<sup>166</sup> CCI, ‘How to File Information?’

<[http://cci.gov.in/sites/default/files/cci\\_pdf/HowToFileInformation.pdf](http://cci.gov.in/sites/default/files/cci_pdf/HowToFileInformation.pdf)> accessed 28 December 2016

<sup>167</sup> Under regulation 17(2), the Commission has the power to call not only the informant but any party including the affected party, Competition Commission of India (General) Regulations, 2009, regs 17 (2) & 44 (1).

<sup>168</sup> Gregory Sidak, ‘The Meaning of FRAND, Part I: Royalties’ *Journal of Competition Law & Economics*, 9(4), 931–1055; Mark Lemley and Carl Shapiro, ‘Patent Holdup and Royalty Stacking’ *Texas Law Review*, Vol. 85, 2007; Kirti Gupta, ‘Technology Standards and Competition in the Mobile Wireless Industry’ 22 *Geo. Mason L. Rev.* 865 2014-2015; Kristian Henningson, ‘Injunctions for standard-essential patents under FRAND commitment: a balanced, royalty-oriented approach’ *International Review of Intellectual Property and Competition Law* 2016; Anne Layne-Farrar, Gerard Llobet, and A. Jorge Padilla ‘Preventing Patent Hold Up: An Economic Assessment of Ex Ante Licensing Negotiations in Standard Setting’, 37 *AIPLA Q. J.* 445 2009; J. Gregory Sidak ‘Injunctive Relief and the FRAND Commitment in the United States’ in *Cambridge Handbook of Technical Standardization Law, Vol. 1: Antitrust and Patents*, Jorge L. Contreras, (ed), (New York: Cambridge Univ. Press forthcoming 2017)

<<https://www.criterioneconomics.com/docs/injunctive-relief-and-the-frand-commitment.pdf>> accessed on 4 January 2016; J. Gregory Sidak ‘FRAND in India’ in *Cambridge Handbook of Technical Standardization Law, Vol. 1: Antitrust and Patents*, Jorge L. Contreras, (ed), (New York: Cambridge Univ. Press forthcoming 2017) <<https://www.criterioneconomics.com/docs/frand-in-india.pdf>> accessed on 4 January 2016.

<sup>169</sup> Supra sections 2.1 – 2.3.

<sup>170</sup> *ibid.*

<sup>171</sup> Case No. 50/2003, Competition Commission of India, Order dt. 12.11.2013.

Going by the practice of CCI at the stage of deciding the prima facie case for detailed investigation, there is a strong possibility that in future cases in the ICT sector, CCI may want to consider all relevant facts provided by the opposite party at the time of making their submissions in response to the complaint filed by the informant. Further, as observed in other similar cases the trend is that Commission would like to listen to both parties at the primary stage and there is no reason to believe that this trend would be different in the ICT cases.

#### ***4.3.2 Overall acceptance of the principle of natural justice***

The Annexure referred to below shows the number of times the parties have been called at the stage when the Commission had to decide the case of prima facie abuse of dominance and instances wherein the complaint was passed onto the DG for detailed investigation (section 26(1)). Further, it also shows how many times the parties have been called when the cases have been dismissed under section 26(2). With cases spanning over the last three years, the overall information is divided into four columns. The columns represent the times when both the parties (informant and opposite party) have been called for hearing, to instances when none of the parties have been called or to instances when one of the parties have been called.

#### ***Orders under 26(1)***

In total, 37 orders have been passed under section 26 (1). Out of the 37 orders, the Commission heard both the parties in 9 orders. The Commission gave an opportunity to the informant of being heard in 19 orders. In 9 orders the Commission passed the orders without hearing either parties. Therefore, a total of 28 out of 37 orders where at least one of the parties have been called, which makes it 75% in the last three years.

If we categorize the information on a yearly basis, then there is an increasing trend in 2015-16 wherein both the parties have been called. Out of the 9 orders, parties have been heard 8 times. On 5 occasions, both the parties were heard. On other 3 occasions only the informant was heard. In comparison only once both parties were called in 2014-15, while



only the informant has been called 8 times out of a total of 11 orders. Similarly, in 2013-14, three times out of a total of 17 orders both parties have been called. The informant has been asked 8 times. Similarly, there is an increasing trend of calling parties at the prima facie stage. For instance, in 2015-16, parties have been heard 8 out of 9 orders. In 2014-15, it was 9 out of 11 and from a total of 11 out of 17 in 2013-14.

### ***Order under 26(2)***

There are 225 orders passed under section 26 (2) in the past three years. Out of 225 orders the commission heard both the parties in 27 orders. The commission gave an opportunity to informant of being heard in 139 orders. In 59 orders the commission passed the orders without hearing either parties.

In fact, we observe an increasing trend when both the parties have been given an opportunity of being heard before a complaint filed under section 19(1) has been dismissed under section 26(2). In 2015-16, it was 16 out of a total of 50 times when both the parties were called.<sup>172</sup> This was a significant improvement from 5 out of 61 in 2014-15 and 6 out of 55 in 2013-14.

## **5 Conclusion**

It is difficult to contemplate the outcome of an investigation initiated by CCI specifically when all relevant information are considered at the preliminary stage. This is beyond the scope of this paper. However, from what has been observed, CCI is willing to go into details of the submissions made even at the prima facie stage and appropriately giving, although to a lesser extent to the SEP holder, the parties a chance to represent themselves. With more representation from the SEP holders, the CCI would certainly have a wider range of information to start with and would be able to adequately address whether a matter needs to be further investigated beyond the prima facie stage. If one refers to the foreign jurisprudence, more specifically *Huawei v ZTE*, and if the guidelines of the CJEU

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<sup>172</sup> The Commission called at least one of the parties in the other 34 instances.

judgement are to be followed consistently in India, there are possible future implications on the outcome of similar cases in India. Since this case revolves around what constitutes abuse of dominance and the behaviour of parties attached to such situation, it provides a great insight to the Competition Authority in India. Future investigations at the preliminary stage may borrow a great deal from the understanding that has emerged from *Huawei v ZTE*.

**Annexure**

**Table 1**

2015-16 – Orders passed under section 26 (1)

| <b>Case No.</b>  | <b>Both parties Heard</b> | <b>None of the parties heard</b> | <b>Only informant heard / opportunity provided to informant</b> | <b>Only OP heard</b> | <b>Whether referred to DG</b> |
|--|---------------------------|----------------------------------|---|----------------------|-------------------------------|
| 03/2016 with Ref Case No. 01/2016 with case No. 10 of 2015 |                           | 1                                |   |                      | 1                             |
| Case No. 01/2015   | 1                         |                                  |   |                      | 1                             |
| Case No. 04/2015   |                           |                                  | 1   |                      | 1                             |
| Case No. 06/2015   |                           |                                  | 1   |                      | 1                             |
| 77/2015  | 1                         |                                  |   |                      | 1                             |
| 88/2014  | 1                         |                                  |   |                      | 1                             |
| 99/2014  |                           |                                  | 1   |                      | 1                             |
| 73/2015  | 1                         |                                  |   |                      |                               |
| Ref Case No. 2/2015 & Case NO. 107 of 2015                 | 1                         |                                  |   |                      |                               |
| <b>Total: 9 Cases</b>                                      | <b>5</b>                  | <b>1</b>                         | <b>3</b>  |                      | <b>7</b>                      |

**Table 2**  
2015-16 – Orders passed under section 26 (2)

| <b>Case No.</b>  | <b>Both parties Heard</b> | <b>None of the parties heard</b> | <b>Only informant heard / opportunity provided to informant</b> | <b>Only OP heard</b> |
|------------------|---------------------------|----------------------------------|---|----------------------|
| 5 & 6 of 2016    |                           | 1                                |   |                      |
| 104/2015         | 1                         |                                  |   |                      |
| 106/2015         |                           |                                  | 1   |                      |
| 14/2016          |                           | 1                                |   |                      |
| Case No. 11/2016 |                           | 1                                |   |                      |
| 112/2015         |                           | 1                                |   |                      |
| 96/2015          | 1                         |                                  |   |                      |
| 108/2015         |                           | 1                                |   |                      |
| Case No. 1/2015  |                           | 1                                |   |                      |
| 110/2015         |                           | 1                                |   |                      |
| 82/2015          | 1                         |                                  |   |                      |
| 102/2015         |                           |                                  | 1   |                      |
| 103/2015         |                           | 1                                |   |                      |
| 86/2015          |                           |                                  | 1   |                      |
| 59/2015          | 1                         |                                  |   |                      |
| 80/2015          |                           | 1                                |   |                      |
| 105/2015         |                           | 1                                |   |                      |
| 98/2015          |                           | 1                                |   |                      |
| 81/2015          | 1                         |                                  |   |                      |
| 95/2015          |                           | 1                                |   |                      |
| 100/2015         |                           | 1                                |   |                      |
| 101/2015         |                           | 1                                |   |                      |
| 38/2015          | 1                         |                                  |   |                      |
| 92/2015          |                           | 1                                |   |                      |
| 49/2015          |                           |                                  | 1   |                      |
| 89/2015          |                           | 1                                |   |                      |
| 91/2015          |                           | 1                                |   |                      |
| 16/2015          |                           |                                  | 1   |                      |
| 90/2015          |                           | 1                                |   |                      |
| 72&76/2015       |                           | 1                                |   |                      |

|                    |   |   |   |  |
|--------------------|---|---|---|--|
| 87/2015            |   | 1 |   |  |
| 88/2015            |   | 1 |   |  |
| 87/2015            |   | 1 |   |  |
| 84/2015            |   | 1 |   |  |
| 63/2015            | 1 |   |   |  |
| 79/2015            |   | 1 |   |  |
| 32/2015            | 1 |   |   |  |
| 75/2015            |   |   | 1 |  |
| 66/2015            | 1 |   |   |  |
| 51/2015            | 1 |   |   |  |
| 70/2015            |   | 1 |   |  |
| 57/2015            |   |   | 1 |  |
| 83/2015            |   | 1 |   |  |
| 46/2015            |   |   | 1 |  |
| 69/2015            |   | 1 |   |  |
| 67/2015            |   | 1 |   |  |
| 91/2014            |   |   | 1 |  |
| 64/2015            |   |   | 1 |  |
| 78/2015            |   |   | 1 |  |
| 43/2015            | 1 |   |   |  |
| Case No.<br>9/2015 | 1 |   |   |  |
| 65/2015            |   | 1 |   |  |
| 33/2015            |   |   | 1 |  |
| 45/2015            |   |   | 1 |  |
| 55 & 56 /2015      | 1 |   |   |  |
| 52/2015            |   |   | 1 |  |
| 48/2015            | 1 |   |   |  |
| 44/2015            |   |   | 1 |  |
| 58/2015            |   | 1 |   |  |
| 19/2015            |   |   | 1 |  |
| 47/2015            |   | 1 |   |  |
| 39 & 40 /2015      |   |   | 1 |  |
| 35/2015            |   |   | 1 |  |
| 20/2015            |   |   | 1 |  |
| 28/2015            |   |   | 1 |  |
| 37/2015            |   | 1 |   |  |
| 23/2015            |   |   | 1 |  |
| 41/2015            |   | 1 |   |  |
| 42/2015            |   | 1 |   |  |

|   |           |           |           |  |
|---|-----------|-----------|-----------|--|
| 29/2015                                 |           |           | 1         |  |
| 24/2015                                 |           |           | 1         |  |
| 31/2015                                 |           |           | 1         |  |
| 21/2015                                 |           |           | 1         |  |
| 81/2012                                 |           |           | 1         |  |
| 22/2015                                 |           |           | 1         |  |
| 13/2015                                 |           |           | 1         |  |
| Case No.<br>11/2015                     |           |           | 1         |  |
| 10, 17, 18, 25,<br>26 and 27 of<br>2015 |           |           | 1         |  |
| 90/2014                                 |           |           | 1         |  |
| Case NO.<br>12/2015                     |           |           | 1         |  |
| 14/2015                                 |           | 1         |           |  |
| 15/2015                                 |           | 1         |           |  |
| 80/2014                                 | 1         |           |           |  |
| Case No.<br>3/2015                      |           | 1         |           |  |
| Case No.<br>7/2015                      |           |           | 1         |  |
| 30/2015                                 | 1         |           |           |  |
| 101/2014                                |           |           | 1         |  |
| <b>Total: 87</b>                        | <b>16</b> | <b>37</b> | <b>34</b> |  |

**Table 3**  
2014 - 15 - Orders passed under section 26 (1)

| <b>Case No.</b>     | <b>Both parties Heard</b> | <b>None of the parties heard</b> | <b>Only informant heard / opportunity provided to informant</b> | <b>Only OP heard</b> | <b>Whether referred to DG</b> |
|---------------------|---------------------------|----------------------------------|---|----------------------|-------------------------------|
| Case No. 12 of 2014 |                           |                                  | 1   |                      | 1                             |
| Case No. 24 of 2014 |                           |                                  | 1   |                      | 1                             |
| Case No. 33 of 2014 | 1                         |                                  |   |                      | 1                             |
| Case No. 36 of 2014 |                           |                                  | 1   |                      | 1                             |
| Case No. 46 of 2014 |                           |                                  | 1   |                      | 1                             |
| Case No. 56 of 2014 |                           | 1                                |   |                      | 1                             |
| Case No. 61 of 2014 |                           |                                  | 1   |                      | 1                             |
| Case No. 63 of 2014 |                           |                                  | 1   |                      | 1                             |
| Case No. 73 of 2014 |                           |                                  | 1   |                      | 1                             |
| Case No. 82 of 2014 |                           | 1                                |   |                      | 1                             |
| Case No. 84 of 2014 |                           |                                  | 1   |                      | 1                             |
| <b>Total: 11</b>    | <b>1</b>                  | <b>2</b>                         | <b>8</b>  |                      | <b>11</b>                     |

**Table 4**  
2014 - 15 - Orders passed under section 26 (2)

| <b>Case No.</b>      | <b>Both parties Heard</b> | <b>None of the parties heard</b> | <b>Only informant heard / opportunity provided to informant</b> | <b>Only OP heard</b> |
|----------------------|---------------------------|----------------------------------|---|----------------------|
| Case No. 97 of 2014  |                           |                                  | 1   |                      |
| C. No. 02 of 2015    |                           |                                  | 1   |                      |
| Case No. 93 of 2014  |                           |                                  | 1   |                      |
| Case No. 01 of 2015  |                           |                                  | 1   |                      |
| Case No. 95 of 2014  |                           |                                  | 1   |                      |
| Case No. 05 of 2015  |                           | 1                                |   |                      |
| Case No. 100 of 2014 |                           |                                  | 1   |                      |
| Case No. 87 of 2014  |                           |                                  | 1   |                      |
| Case No. 83 of 2014  |                           |                                  | 1   |                      |
| Case No. 96 of 2014  |                           |                                  | 1   |                      |
| Case No. 86 of 2014  |                           |                                  | 1   |                      |
| Case No. 74 of 2014  |                           |                                  | 1   |                      |
| Case No. 79 of 2014  |                           |                                  | 1   |                      |
| Case No. 85 of 2014  |                           |                                  | 1   |                      |
| Case No. 92 of 2014  |                           |                                  | 1   |                      |
| Case No. 66 of 2014  |                           |                                  | 1   |                      |
| Case No. 76 of 2014  |                           |                                  | 1   |                      |
| Case No. 69 of 2014  |                           |                                  | 1   |                      |



|                          |   |   |   |  |
|--------------------------|---|---|---|--|
| Case No. 70 of 2014      |   |   | 1 |  |
| Case No. 77 of 2014      |   |   | 1 |  |
| Case No. 81 of 2014      |   |   | 1 |  |
| Case No. 60 of 2014      |   |   | 1 |  |
| Case No. 78 of 2014      |   |   | 1 |  |
| Case No. 68 of 2014      |   |   | 1 |  |
| Case Nos. 75 of 2014     |   | 1 |   |  |
| Case No. 67 of 2014      |   |   | 1 |  |
| Case No. 59 of 2014      |   | 1 |   |  |
| Case Nos. 62 of 2014     |   | 1 |   |  |
| Case No. 58 of 2014      |   |   | 1 |  |
| Ref. Case No. 07 of 2014 |   |   | 1 |  |
| Case No. 57 of 2014      |   | 1 |   |  |
| Case No. 31 of 2014      | 1 |   |   |  |
| Case No. 55 of 2014      |   | 1 |   |  |
| Ref. Case No. 03 of 2014 | 1 |   |   |  |
| Case Nos. 50 of 2014     |   |   | 1 |  |
| Case No. 54 of 2014      |   |   | 1 |  |
| Case Nos. 45 of 2014     |   | 1 |   |  |
| Case No. 48 of 2014      |   |   | 1 |  |
| Case No. 34 of 2014      |   |   | 1 |  |
| Case No. 38 of 2014      | 1 |   |   |  |

|                               |   |   |   |  |
|-------------------------------|---|---|---|--|
| Case No. 52 of 2014           |   | 1 |   |  |
| Case No. 40 of 2014           |   |   | 1 |  |
| Case No. 51 of 2014           |   |   | 1 |  |
| Ref. Case No. 05 of 2014      |   |   | 1 |  |
| Case No. 27 of 2014           |   | 1 |   |  |
| Case No. 37 of 2014           |   |   | 1 |  |
| Case No. 53 of 2014           |   |   | 1 |  |
| Case No. 44 of 2014           |   |   | 1 |  |
| Case No. 43 of 2014           | 1 |   |   |  |
| Case No. 39 of 2014           |   |   | 1 |  |
| Ref. Case No. 01 of 2014      |   | 1 |   |  |
| Case No. 42 of 2014           |   |   | 1 |  |
| Case No. 29 of 2014           |   |   | 1 |  |
| Case No. 41 of 2014           |   |   | 1 |  |
| Case No. 32 of 2014           |   |   | 1 |  |
| Case No. 35 of 2014           | 1 |   |   |  |
| Case Nos. 21, 22 & 23 of 2014 |   |   | 1 |  |
| Case Nos. 25 of 2014          |   |   | 1 |  |
| Case No. 20 of 2014           |   |   | 1 |  |
| Case No. 26 of 2014           |   |   | 1 |  |
| Case No. 13 of 2014           |   |   | 1 |  |
| Case No. 17 of 2014           |   |   | 1 |  |

|                     |          |           |           |  |
|---------------------|----------|-----------|-----------|--|
| Case No. 14 of 2014 |          |           | 1         |  |
| Case No. 07 of 2014 |          |           | 1         |  |
| Case No. 10 of 2014 |          |           | 1         |  |
| Case No. 09 of 2014 |          |           | 1         |  |
| Case No. 15 of 2014 |          |           | 1         |  |
| Case No. 03 of 2014 |          |           | 1         |  |
| Case No. 11 of 2014 |          |           | 1         |  |
| Case No. 05 of 2014 |          |           | 1         |  |
| Case No. 04 of 2014 |          |           | 1         |  |
| <b>Total: 71</b>    | <b>5</b> | <b>10</b> | <b>56</b> |  |

**Table 5**  
2013 - 14 - Orders passed under section 26 (1)

| <b>Case No.</b>      | <b>Both parties Heard</b> | <b>None of the parties heard</b> | <b>Only informant heard / opportunity provided to informant</b> | <b>Only OP heard</b> | <b>Whether referred to DG</b> |
|----------------------|---------------------------|----------------------------------|---|----------------------|-------------------------------|
| Case No. 74 of 2012  | 1                         |                                  |   |                      | 1                             |
| Case No. 20 of 2013  |                           | 1                                |   |                      | 1                             |
| Case No. 06 of 2013  | 1                         |                                  |   |                      | 1                             |
| Case No. 45 of 2013  |                           | 1                                |   |                      | 1                             |
| Case No. 37/2013     |                           | 1                                |   |                      | 1                             |
| Case No. 44 of 2013  |                           | 1                                |   |                      | 1                             |
| Case No. 52 of 2013  |                           | 1                                |   |                      | 1                             |
| Case No. 50/2013     | 1                         |                                  |   |                      | 1                             |
| Case No. 59 of 2013  |                           |                                  | 1   |                      | 1                             |
| Case No. 65/2013     |                           |                                  | 1   |                      | 1                             |
| Case No. 76/2013     |                           |                                  | 1   |                      | 1                             |
| Case No. 88 of 2013  |                           |                                  | 1   |                      | 1                             |
| Case No. 01 of 2014  |                           |                                  | 1   |                      | 1                             |
| Case No. 100 of 2013 |                           |                                  | 1   |                      | 1                             |
| Case No. 93/2013     |                           |                                  | 1   |                      | 1                             |
| Case No. 08 of 2014  |                           | 1                                |   |                      | 1                             |
| Case No. 105 of 2013 |                           |                                  | 1   |                      | 1                             |
| <b>Total: 17</b>     | <b>3</b>                  | <b>6</b>                         | <b>8</b>  |                      | <b>17</b>                     |

**Table 6**  
2013 - 14 - Orders passed under section 26 (2)

| <b>Case No.</b>               | <b>Both parties Heard</b> | <b>None of the parties heard</b> | <b>Only informant heard / opportunity provided to informant</b> | <b>Only OP heard</b> |
|-------------------------------|---------------------------|----------------------------------|---|----------------------|
| Case No. 02 of 2014           |                           |                                  | 1   |                      |
| Case No. 102/2013             |                           |                                  | 1   |                      |
| Case No. 94 of 2013           | 1                         |                                  |   |                      |
| Case No. 98/2013              |                           |                                  | 1   |                      |
| Case No. 92 of 2013           |                           |                                  | 1   |                      |
| Case No. 78 of 2013           |                           |                                  | 1   |                      |
| Case Nos. 81, 82 & 83 of 2013 | 1                         |                                  |   |                      |
| Case No. 104 of 2013          |                           |                                  | 1   |                      |
| Case No. 101/2013             |                           |                                  | 1   |                      |
| Case No. 103/2013             |                           | 1                                |   |                      |
| Case No. 84/2013              |                           |                                  | 1   |                      |
| Case No. 87of 2013            |                           |                                  | 1   |                      |
| Case No. 96 of 2013           |                           | 1                                |   |                      |
| Case No. 95 of 2013           |                           |                                  | 1   |                      |
| Case No. 79/2013              |                           |                                  | 1   |                      |
| Case No. 67/2013              | 1                         |                                  |   |                      |
| Case No. 85/2013              |                           |                                  | 1   |                      |

|                     |   |   |   |  |
|---------------------|---|---|---|--|
| Case No. 73 of 2013 |   |   | 1 |  |
| Case No. 86/2013    |   | 1 |   |  |
| Case No. 90/2013    |   |   | 1 |  |
| Case No. 77/2013    |   |   | 1 |  |
| Case No.91/2013     |   | 1 |   |  |
| Case No. 55/2013    |   |   | 1 |  |
| Case No 89/2013     |   | 1 |   |  |
| Case No. 70 of 2013 |   |   | 1 |  |
| Case No. 72 of 2013 | 1 |   |   |  |
| Case No. 75/2013    |   | 1 |   |  |
| Case No. 80/2013    |   | 1 |   |  |
| Case No. 74 of 2013 |   |   | 1 |  |
| Case No. 62/2013    |   |   | 1 |  |
| Case No. 61 of 2013 |   |   | 1 |  |
| Case No. 60 of 2013 | 1 |   |   |  |
| Case No. 53/2013    |   |   | 1 |  |
| Case No. 69 of 2013 |   |   | 1 |  |
| Case No. 64/2013    |   |   | 1 |  |
| Case No. 58 of 2013 |   | 1 |   |  |
| Case No.66 of 2013  |   | 1 |   |  |
| Case No. 51 of 2013 |   | 1 |   |  |
| Case No. 39 of 2013 |   |   | 1 |  |
| Case No. 57 of 2013 |   |   | 1 |  |

|                     |  |   |   |  |
|---------------------|--|---|---|--|
| Case No.54 of 2013  |  |   | 1 |  |
| Case No. 15/2013    |  |   | 1 |  |
| Case No. 40 of 2013 |  |   | 1 |  |
| Case No. 41/2013    |  |   | 1 |  |
| Case No. 46 of 2013 |  |   | 1 |  |
| Case No. 28/2013    |  |   | 1 |  |
| Case No. 31/2013    |  |   | 1 |  |
| Case No. 34 of 2013 |  |   | 1 |  |
| Case No. 18 of 2013 |  | 1 |   |  |
| Case No. 33 of 2013 |  |   | 1 |  |
| Case No. 23 of 2013 |  |   | 1 |  |
| Case No. 27 of 2013 |  |   | 1 |  |
| Case No. 24/2013    |  |   | 1 |  |
| Case No. 22/2013    |  |   | 1 |  |
| Case No. 25 of 2013 |  |   | 1 |  |
| Case No. 04 of 2013 |  |   | 1 |  |
| Case No. 35 of 2013 |  |   | 1 |  |
| Case No. 09 of 2013 |  |   | 1 |  |
| Case No. 3 of 2013  |  |   | 1 |  |
| Case No. 12 of 2013 |  |   | 1 |  |
| Case No.11/2013     |  |   | 1 |  |
| Case No. 19 of 2013 |  |   | 1 |  |
| Case No. 16 of 2013 |  |   | 1 |  |

|                        |          |           |           |  |
|------------------------|----------|-----------|-----------|--|
| Case No.<br>02/2013    |          | 1         |           |  |
| Case No.<br>80/2012    | 1        |           |           |  |
| Case No. 14 of<br>2013 |          |           | 1         |  |
| Case No. 8 of<br>2013  |          |           | 1         |  |
| <b>Total: 67</b>       | <b>6</b> | <b>12</b> | <b>49</b> |  |

*Only considered the Orders available on CCI's website for the period starting from 1<sup>st</sup> April to 31<sup>st</sup> March of the respective year.*