

## **Bharti Airtel Limited v. Reliance Industries Limited & Other (Ref. Case Nos. 03/2017)**

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**Decision Date:** 09.06.2017

**Keywords:** *Bid rigging in Public Procurement Process; collusion; single economic entity*

**Issue:** Whether there was collusive bidding in the public procurement process?

**Rule:** Sec. 3(4) or Sec. 4, Sec. 19 (1) (a) of Competition Act, 2002 concerning Anti-Competitive Agreements and collusive bidding

Bharti Airtel Limited (hereinafter ‘informant’) had filed information in this case under section 19 (1) (a) of the Competition Act, 2002 (hereinafter ‘Act’) against Reliance Industries Limited (RIL) and Reliance Jio Infocomm Limited (RJIL) alleging violation of section 3 and 4 of the Act. While RIL is a multi-sectoral conglomerate of high-value businesses, being the largest private company in India, the informant is a global telecommunication company that is the first operator to roll out 4G Long Term Evolution (LTE) wireless services in India.<sup>1</sup> The primary contention relates with RIL’s huge investment of 96% in Infotel Broadband Services Private Limited (IBSL) after the latter had won the spectrum auction in 2300 MHz band category on pan India basis in 2010 and its subsequent renaming into RJIL. RIL holds 99.44 % stake in RJIL and has invested Rs. 1,60,000 crore in RJIL, enabling it to roll out 4G services in all 22 service areas in India after setting up necessary infrastructure.<sup>2</sup>

This financial ability had enabled RJIL to offer free services since its inception and continue to do so after repeated extensions from Telecom Regulatory Authority of India (TRAI) for over an year.<sup>3</sup> It had provided *Jio Welcome Offer* from 5 September 2016 and *Happy New Year Offer* continuing from 1<sup>st</sup> January 2017 till 31 March 2017 in addition to providing *Jio i Phone Offer* for one year for iPhone users. Informants claimed that this invokes charges of predatory pricing under Section 4(2)(a)(ii) of the Act. It characterizes “*providing 4G LTE services of telecommunication in India*” as the relevant market<sup>4</sup> and claims that RJIL is in the dominant position in the same on account of being the top carrier in India by mobile user base which was

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<sup>1</sup>Para 4 and 5.

<sup>2</sup> Para 5.

<sup>3</sup> Para 6.3.

<sup>4</sup> Para 6.1.

72.4 million as on 31<sup>st</sup> December 2016.<sup>5</sup> It claims that this violates the regulatory requirement of ‘calling party pays’.<sup>6</sup>

The counsel for informants placed importance on precedent of the Commission and the Competition Appellate Tribunal in the case filed by MCX Stock Exchange Limited alleging predatory pricing by National Stock Exchange of India Limited (Case No. 13/2009), judgment of the High Court of Ontario, Canada in Regina v. Hoffmann-La Roche Limited (30 O.R. (2d) 461), decision of the European Court of Justice in the matter of France Telecom SA v. Commission of the European Communities (Case C- 202/07 P).<sup>7</sup>

The counsel for RIL stated that the Informant’s submissions regarding leverage of dominant position and anti- competitive agreement were implausible since mere investment into a telecom start-up could neither be construed as abuse of dominant position nor an anti-competitive agreement.<sup>8</sup>

It submitted that the unique characteristics of 4G LTE technology, advanced infrastructure requirement and the need for customers to have 4G compatible mobile instruments, distinguish it from 2G/3G services.<sup>9</sup> It relied on the decisions of the Commission in Shree Gajanana Motor Transport Company Limited v. Karnataka State Road Transport Corporation (Case No. 85 of 2016), Exclusive Motors Private Limited v. Automobili Lamborghini S. P. A. (Case No. 52 of 2012), Jeetender Gupta v. BMW India Limited (Case No. 104 of 2013) and Ravi Beriwal v. Lexus Motors Limited and Another (Case no. 79 of 2016).<sup>10</sup>

The CCI concluded that these precedents were specific to the facts and circumstances of the cases and were irrelevant to the wireless telecommunication services impugned herein. Since relevant market is an economic reality determined based on facts and circumstances of each case, it decided that the relevant product market in the present case is the market for ‘provision of wireless telecommunication services to end users in each of the 22 circles in India’.<sup>11</sup>

The CCI concluded that the Informant’s submissions were contradictory as it alleged RIL/RJIL of providing free services due to an unfair dominant position as well as an outcome of anti-

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<sup>5</sup> Para 6.2.

<sup>6</sup> Para 6.4.

<sup>7</sup> Para 7.

<sup>8</sup> Para 10.

<sup>9</sup> Para 11.

<sup>10</sup> Para 11.

<sup>11</sup> Para 18.

competitive agreement between them. The CCI noted that no such agreement prohibited under Section 3 of the Act was discernible from the facts. It also found the conduct of RJIL not contravening the provisions of the Act prohibiting unfair pricing including predatory pricing. With regard to RIL, it held that it wasn't in contravention of Section 4(2)(e) of the Act just because it has made huge investments in RJIL especially when RIL itself was not engaged in business of providing telecom services. Such interpretation that makes RIL liable for mere investments, would deter entry and/or expansion and hinder the growth of markets. Thus, no prima facie case of contravention of Section 3(1) or Section 4(2)(e) of the Act is made out against RIL/RJIL.<sup>12</sup>

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<sup>12</sup> Para 23.