Case No. 76/2013

In Re:

Intex Technologies (India) Limited
Address: D-18/2, Okhla Industrial Area,
Phase -II, New Delhi - 110020. Informant

And

Telefonaktiebolaget LM Ericsson (Publ)
Address: Ericsson Forum, DLF Cyberciti,
Sector 25 A, Gurgaon, Haryana - 122002. Opposite Party

CORAM:

Mr. Ashok Chawla
Chairperson

Dr. Geeta Gouri
Member

Mr. Anurag Goel
Member

Mr. M. L. Tayal
Member

Justice S. N. Dhingra (Retd.)
Member

Mr. S. L. Bunker
Member

Present: Shri Balbir Singh, Advocate for the Informant alongwith Shri Atul Jain, Director of Informant.

Order under Section 26(1) of The Competition Act, 2002

Intex Technologies (India) Limited (hereinafter referred to as '**Informant**') a Company duly incorporated under the Companies Act, 1956 in India, having a pan India presence. Its product portfolio includes more than 29 products and its product groups spread across 250 items including Mobile

Phones, Multimedia Speakers, Desktops LED / LCD TVs CRT, DVD players, Computer UPS, Cabinets, Headphones etc. The informant stated that it provided high end technology at affordable prices and was one of the top 300 trusted brands in India.

2. The Informant further stated that it sources custom-made mobile devices from various other countries, and markets them under its brand name. The other players in the industry like Micromax, Lava, Karbonn, Maxx, Fly etc. also source custom-made mobile phones and market them to Indian customers under their respective brand names. It is also alleged that these above said players compete amongst themselves as well as with global brands like Nokia, Sony, Sony Ericsson, Samsung, Apple, Blackberry, etc. in the mobile handset industry.

3. The Informant claims to cater to all income groups of Indian consumers by providing approximately 35 different models in the price of Rs. 950 – Rs. 3000 and smartphones in price range of Rs. 4000 - Rs. 25000.

4. The Opposite Party i.e. Telefonaktiebolaget LM Ericsson (Publ) ('**Ericsson/Opposite Party'**), was the parent company of the Ericsson Group, headquartered at Sweden, a global player in the telecommunications sector. It was in the business of manufacturing network/ base station equipment, and setting up and managing telecommunications networks. Ericsson also had sizeable business in the handset manufacturing sector in the past, but recently been concentrating on its business of patent licensing / monetization, which forms one of its prominent revenue streams. Ericsson India Private Limited was the wholly owned subsidiary of the OP1.

5. As per the Informant, Ericsson held 33,000 granted patents and was the largest holder of Standard Essential Patents for mobile communication and its unrivalled patent portfolio covered 2G, 3G and 4G technologies, with more then 100 patent licensing agreements. Ericsson also got patented many of its technologies in India. Ericsson also claimed to be the patentee of a huge portfolio of Standard Essential Patents required for mobile handsets and

network stations. Suffice it to state at this juncture that a Standard Essential Patent (**"SEP"**) is one for which there are no non-infringing alternatives. A SEP holder is therefore under an obligation to license the SEPs to every party under Fair, Reasonable and Non-Discriminatory (FRAND) terms, in terms of the irrevocable commitment made to standard setting organization, such as European Telecommunications Standard Institute (ETSI).

6. The informant alleged that Ericsson, by way of its "Term Sheet for A Global Patent License Agreement (GPLA)" demanded exorbitant royalty rates and unfair terms for licensing its patents to the Informant. Ericsson also made it clear that the jurisdiction and governing law for the GPLA would only be Sweden.

7. As per the Informant, Ericsson publicly claimed that it takes its FRAND commitments very seriously and offers a broadly uniform rate to all similarly placed potential licensees. However, Ericsson refused to share the commercial terms and royalty payments on the grounds of Non-Disclosure Agreements ("**NDAs**"), strongly suggestive of the fact that different royalty rates/commercial terms were being offered to the potential licensees belonging to the same category. Ericsson also required the Informant to enter into an NDA as a necessary pre-condition for letting the Informant know about the details of the alleged infringement. Informant also stated that despite several objections and reservations, it was compelled to sign the NDA before Ericsson provided details of infringement to the Informant.

8. Informant also highlighted that as there were several actual and potential licensees, similarly placed as the Informant, required to obtain licences from Ericsson. The above said conduct of Ericsson will raise a spectre of royalty stacking and patent hold up issues. The royalty rates prescribed by Ericsson for Informant were excessive and discriminatory. This practice and insistence of OP in respect of essential patents was likely to render the business of the Informant unviable.

9. The NDA prevents the Informant from disclosing any proprietary confidential information of Ericsson to the Informant's vendors. As a result, the Informant cannot even discuss with its vendors, regarding the alleged infringements, of Ericsson's patents for the products supplied by them despite the fact that the Informant had specific agreements in place with such vendors wherein the vendors have represented that the products of the vendor do not infringe any of the intellectual property rights of third parties. Further, the NDA provides for jurisdiction of Singapore and cripples the Informant to address or seek redress of its grievances in a local court of law.

10. The Commission considered all the materials on record including the information and the arguments addressed by the Advocate for the Informant.

11. Ericsson is the member of a Standard Setting Organisation, namely European Telecommunications Standards Institute (**ETSI**), a non-profit organization with more than 700 member organizations from 62 countries from 5 continents and is officially recognized by the European Union as a European Standards Organization. ETSI produces globally applicable standards for information and communication technologies i.e. fixed, mobile, radio, converged, broadcast and internet technologies, some of which are covered by patents held by ETSI or ETSI members like Ericsson. Standardisation is a voluntary process wherein a number of market players reach a consensus for setting 'common technology standards' under the support of a Standard Setting organisation, which in the present case is ETSI. In simple terms, standardisation is the process of developing and implementing technical standards. Such technological standards are termed as Standard Essential Patent, when they are patented and for which there are no non-infringing alternatives. Once a patent is declared as Standard Essential Patent, it faces no competition from other patents until that patent becomes obsolete due to new technology/inventions.

12. As per clause 6 of ETSI IPR policy, an IPR owner is required to give *irrevocable written undertaking*, that it is prepared to grant irrevocable licences on FRAND Terms, **to be applied fairly and uniformly to similarly**

placed players. The patent owner has to grant irrevocable licence to the following extent:

a) Manufacture, including the right to make or have made customized components and sub-systems to the licensee's own design for use in manufacture;
b) Sell, lease, or otherwise dispose of equipment so manufactured;
c) Repair, use, or operate equipment; and
d) Use methods

13. FRAND licences are primarily intended to prevent Patent Hold-up and Royalty Stacking. Patent Hold-up is one of the serious problems faced by the information and communications industry worldwide. The usefulness of complex products and services often depend on the interoperability of components and products of different firms. To enhance the value of these complex products, competing manufacturers, customers and suppliers – participate in standard-setting practices to set technological standards for use in designing products or services. When such standard technologies are protected by patent rights, there is a possibility for "hold-up" by the patent owner – a demand for higher royalties or more costly or burdensome licensing terms than could have been obtained before the standard was chosen. Hold-up can subvert the competitive process of choosing among technologies and undermine the integrity of standard-setting activities. Ultimately, the High costs of such patents get transferred to the final consumers. Similarly, royalty-stacking is when a single product uses many patents, of same or different licencors. As such, from the perspective of the firm making the product, all the different claims for royalties must be added or "stacked" together to determine the total burden of royalty to be borne by the manufacturer.

14. In the present case, Ericsson had declared to ETSI that it had patents over 2G, 3G and EDGE Technology and these patents were 'Standard Essential Patents'. As per its undertakings, Ericsson was required to offer and conclude licences with patent seekers on FRAND Terms. Ericsson's patents having been accepted by Department of Telecommunication, India, every

telecom service provider in India was required to enter into a 'Unified Access Service License' Agreement with Department of Telecommunication (**DoT**). As per letter dated 03.10.2008, DoT had directed that All GSM/CDMA network equipment imported into India should also meet the standards of international telecommunication technology, as set by International Telecommunication Union, Telecommunication Engineering Center and International Standardization bodies such as 3GPP, 3GPP-2, ETSI, IETF, ANSI, EIA, TIA, IS.

15. In the present case, the SEPs owned by OP are in respect of the 2G, 3G and 4G patents used for smart phones, tablets etc., which fall under 'GSM' technology. As such, *prima facie* the relevant product market would be "the provision of SEP(s) for 2G, 3G and 4G technologies in GSM standard compliant mobile communication devices." The Informant has contended dominance of Ericsson in the pan-India markets and the relevant geographic market would be the territory of India. The relevant market thus would be market of SEP(s) for 2G, 3G and 4G technologies in GSM standard compliant mobile communication devices in India.

16. From the perusal of the Information and the documents filed by the Informant, *prima facie* it is apparent that Ericsson was dominant in the relevant market of GSM and CDMA technologies in India as it held a large number of GSM and CDMA patents. Ericsson has 33,000 patents to its credit, with 400 of these patents granted in India, and the largest holder of SEPs for mobile communications like 2G, 3G and 4G patents used for smart phones, tablets etc. Further, since the OP holds SEPs and there was no other alternate technology in the market in India, OP enjoyed complete dominance over its present and prospective licensees in the relevant product market. As such, OP prima facie can be said to be dominant in the relevant market.

17. The allegations made in the information concerning royalty rates make it clear that the practices adopted by the OP were discriminatory as well as contrary to FRAND terms. The royalty rates being charged by the OP had no linkage to patented product, contrary to what is expected from a patent owner

holding licences on FRAND terms. The OP seemed to be acting contrary to the FRAND terms by imposing royalties linked with cost of product of user for its patents. Refusal of OP to share commercial terms of FRAND licences with licensees similarly placed to the informant, fortifies the accusations of the Informant, regarding alleged discriminatory commercial terms imposed by the OP. For the use of GSM chip in a phone costing Rs. 100, royalty would be Rs. 1.25 but if this GSM chip is used in a phone of Rs. 1000, royalty would be Rs. 12.5. Thus increase in the royalty for patent holder is without any contribution to the product of the licensee. Higher cost of a smartphone is due to various other softwares/technical facilities and applications provided by the manufacturer/licensee for which he had to pay royalties/charges to other patent holders/patent developers. 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-a-vis high cost phones. NDA thrust upon the consumers by OP strengthens this doubt as after NDA, each of the user of SEPs is unable to know the terms of royalty of other users. This is contrary to the spirit of 'applying FRAND terms fairly and uniformly to similarly placed players.' Transparency is hallmark of fairness. Both forcing a party to execute NDA and imposing excessive and unfair royalty rates *prima facie* was abuse of dominance and violation of section 4 of the Act. Imposing a jurisdiction clause debarring Informant from getting disputes adjudicated in the country where both parties were in business and vesting jurisdiction in a foreign land *prima facie* was also an abuse of dominance.

18. It is a matter of record that the practice of Ericsson of imposing discriminatory royalty rates contrary to FRAND terms, was previously considered by the Commission in Case no. 50/2013, In Re: Micromax Informatics Limited vs. Telefonaktiebolaget LM Ericsson (Publ), wherein the Commission had already formed a *prima facie* opinion under section 26(1) of the Act and directed the Director General to conduct an investigation.

19. In view of above, the Commission is of the opinion that the present case be clubbed for causing an investigation to be made under proviso to

section 26(1) of the Act, with the Case no. 50/2013, currently being investigated by the Director General.

20. Accordingly, DG is directed to cause an investigation in the above matter thoroughly, looking into all allegations made by informant and for all violations of Competition Act within a period of 60 days. In case the DG finds OP in violation of the provision of the Act, it shall also investigate the role of the persons, who at the time of such contravention, were incharge of and responsible for the conduct of the business of OP involved so as to fix responsibility of such persons under section 48 of the Act. DG shall give opportunity of hearing to such persons in terms of section 48 of the Act.

21. Nothing stated in this order shall tantamount to a final expression of opinion on merit of the case and the DG shall conduct the investigation without being swayed in any manner whatsoever by the observations made herein.

22. The Secretary is directed to inform the DG accordingly.

New Delhi
Date 16.01.2014

Sd/-
(Ashok Chawla)
Chairperson

Sd/-
(Dr. Geeta Gouri)
Member

Sd/-
(Anurag Goel)
Member

Sd/-
(S. N. Dhingra)
Member

Sd/-
(M. L. Tayal
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