

3<sup>rd</sup> DAMODARAM SANJIVAYYA  
NATIONAL MOOT COURT  
COMPETITION - 2017

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MOOT PROPOSITION



## **MOOT PROPOSITION**

1. Rococo Technologies (“Rococo”) is a Swiss multinational provider of communications technology and services, incorporated in Switzerland in 1950. Rococo is involved in offering services, software and infrastructure for telecom operators and other industries, including telecommunications and networking equipment, mobile and fixed broadband, operations and business support solutions, cable TV, etc. Rococo is the world leader in the 2G/3G/4G mobile network market. This position of strength comes from one of the strongest holdings of standard essential patents (“SEPs”) in the wireless industry (in particular, SEPs pertaining to the 2G and 3G technologies) and holds approximately 45,000 granted patents (last assessed in 2013). Rococo has declared on its website and to the European Telecommunications Standards Institute (“ETSI”) that it will license its SEPs to SEP implementers on fair, reasonable and non-discriminatory (“FRAND”) terms. Whilst Rococo used to manufacture and sell mobile phone handsets, in 2009, it divested its mobile handset business and now only operates as a provider of cellular infrastructure and conducts research operations with several European research programs.
2. MaxSmall Private Limited (“MaxSmall”) is an Indian enterprise engaged in the sale of smartphones in India since 2010. MaxSmall does not manufacture smartphones but imports such phones from Chinese manufacturers and brands them as MaxSmall phones. MaxSmall is one of the success stories of the Indian telecom industry – it has been able to compete fiercely with established brands such as Samsung and Apple because of its high-quality offerings at low prices. MaxSmall is poised to have an



Initial Public Offering in January 2014 and is considered to be an Indian telecom brand to be reckoned with (it has even signed on one of the actors from the Avenger movie series to be its brand ambassador and has also won the lead sponsorship role for the Cricket World Cup for 2016!). MaxSmall has therefore become the largest Indian domestic mobile handset company operating in India.

3. The Bharat Cellular Association ("BCA") is an Indian trade union that is dedicated to the advancement of the Indian telecommunication industry. Its members comprise of domestic mobile handset suppliers (including MaxSmall and other similar Indian handset suppliers) and it provides a forum for discussion and exchange of ideas between its members and industry stakeholders, the government, etc.
4. On 5<sup>th</sup> September, 2012, Rococo issued a legal notice to MaxSmall stating that it believes that the smartphones being sold by MaxSmall incorporate Rococo's SEPs. In the notice, Rococo stated that MaxSmall should enter into a license agreement for MaxSmall's use of these SEPs at the earliest, at the rate of 1.20% of the sale price of each MaxSmall smartphone incorporating Rococo's SEPs. If this was not agreed to within 15 days of dispatch of the notice, Rococo stated that it would take suitable action as it deemed fit. The notice did not set out the SEPs alleged to be infringed by MaxSmall, and instead, called upon MaxSmall to identify its smartphones which incorporate Rococo's SEPs. MaxSmall received the notice on 25<sup>th</sup> September, 2012 and issued a response on 28<sup>th</sup> September, 2012 stating that it was not aware of any of its smartphones infringing Rococo's SEPs and called upon Rococo to identify the SEPs it alleged to hold in MaxSmall's smartphones (MaxSmall attached its



smartphone brochure to its response to enable Rococo to determine infringing SEPs). MaxSmall also stated that it would be willing to meet Rococo representatives at the Taj Mansingh, New Delhi, on 4<sup>th</sup> October, 2012 to continue discussions. However, no meeting was held and all discussions between Rococo and MaxSmall ceased.

5. In September 2013, MaxSmall announced record profits and industry analysts predicted that the time was ripe for MaxSmall to consider a public offering. There were rumours circulating in the Indian telecom industry that MaxSmall had engaged leading investment banks and lawyers for the purposes of a public offering. Analysts estimated that this public offering may be amongst the largest public offerings in Indian capital markets history.
6. On 4<sup>th</sup> October, 2013, Rococo filed a patent infringement suit against MaxSmall before the Delhi High Court and on 6<sup>th</sup> October, 2013 obtained an ex-parte ad interim injunction against MaxSmall on the basis of infringements of Rococo SEPs incorporated in MaxSmall smartphones. As per the injunction order, MaxSmall was prohibited from importing any further smartphones into the country. Since all of MaxSmall's handsets are imported from Chinese manufacturers, the injunction resulted in the exclusion of all of MaxSmall's products. MaxSmall filed an application for vacation of the injunction dated 6<sup>th</sup> October, 2013, which was heard and allowed by the Delhi High Court pursuant to a consent decree dated 28<sup>th</sup> October 2013. Under the terms of the consent decree, MaxSmall agreed to (until the disposal of the suit) pay to the Delhi High Court, the royalties accruing to Rococo, calculated at 1.20% of the sale price of all its smartphones from 2010 onwards (sale price at the time of



release of the phone). MaxSmall also filed a counterclaim, challenging the validity of the SEPs being asserted by Rococo.

7. On 15<sup>th</sup> November, 2013, MaxSmall filed an “Information” under section 19(1)(a) of the Competition Act, 2002 ("Competition Act"), alleging that Rococo is dominant in the market for SEPs for 2G and 3G technologies and by seeking and enforcing an injunction before the Delhi High Court on the basis of smartphone SEPs, Rococo had abused its dominant position in violation of Section 4 of the Competition Act. The Competition Commission of India ("CCI") found that Rococo’s behaviour prima facie constituted an abuse of dominance and issued a prima facie order on 27<sup>th</sup> December, 2013 under Section 26(1) of the Competition Act directing the Director General ("DG") to investigate (“Case No. 31/2013”).
8. The DG, during the investigation, recovered certain correspondence dated 15<sup>th</sup> November, 2012 between MaxSmall and other handset suppliers (all members of the BCA) and a subsequent resolution dated 25<sup>th</sup> November, 2012 passed by the BCA, wherein BCA members (including MaxSmall) had collectively decided to cease all negotiations with Rococo unless Rococo agreed to a flat royalty rate of 0.20% of the chipset price (and not the final sale price of the phone) from each BCA member. Pursuant to this discovery, the DG called upon representatives of Indian handset suppliers (who were members of the BCA) to depose before the DG. During the deposition, a few members of the BCA (such as Titanium, Molten and Lelo), when confronted by the DG on the BCA resolution dated 25<sup>th</sup> November 2012, stated that MaxSmall had insisted that the said resolution be passed and that the smaller Indian



handset sellers (such as Titanium, Molten and Lelo) had no option but to agree to the resolution being demanded by MaxSmall.

9. Based on these depositions and the evidence collected, the DG, in an internal note to the CCI, requested the CCI for permission to initiate investigation against the Indian handset suppliers (namely MaxSmall, Titanium, Molten and Lelo) under Section 3(3) of the Competition Act. The CCI, passed an order dated 27<sup>th</sup> February, 2014, granting the DG permission to conduct an investigation into potential violations of Section 3(3) of the Competition Act by the Indian handset suppliers under Case No. 31/2013 itself, in addition to the investigation of Rococo under Section 4 of the Competition Act.
10. The DG concluded its investigation and filed its Investigation Report in Case No. 31/2013 ("DG's Report") with the CCI on 22<sup>nd</sup> November 2015. The DG's Report found that Rococo, by seeking an injunction against a potential licensee on terms that were contrary to FRAND commitments, had abused its dominant position in the market for licensing of 2G/3G technology for mobile communication devices in violation of Section 4(2)(b) and 4(2)(c) of the Competition Act. Further, Rococo's proposed royalty rate of 1.20% of the sale price of the smartphone was found to be an excessive and unfair price in violation of Section 4(2)(a)(ii) of the Competition Act. The DG's Report also held that Rococo had failed act in accordance with the "special responsibility" cast upon dominant enterprises.
11. In respect of the cartelization investigation, the DG's Report found that the Indian handset suppliers, namely MaxSmall, Titanium, Molten and Lelo, had entered into a



price-fixing arrangement in the nature of a “buyers cartel” and had infringed Section 3(3) of the Competition Act.

12. The CCI, on receiving the DG’s Report, directed Rococo, MaxSmall, Titanium, Molten and Lelo, to file their Reply / Objections to the DG’s Report, by 11<sup>th</sup> February, 2017. The CCI has decided to hear the matters together on 26<sup>th</sup> February, 2017. Rococo has been directed to defend against the findings of an abuse of dominance contained in the DG’s Report, but may support the cartelization finding against the Indian handset suppliers. MaxSmall, Titanium, Molten, and Lelo, on the other hand, have been directed to defend against the findings of cartelization and price-fixing in violation of Section 3(3) of the Competition Act and may support the findings of an abuse of dominance against Rococo in the DG’s Report. The following issues have to be considered by the CCI at the final hearings on the parties’ Reply / Objections to the DG’s Report:

- (i) Whether the DG was correct in defining the relevant market as the market for the “licensing of 2G/3G technology for mobile communication devices in India” and whether Rococo is dominant in this relevant market?
- (ii) Whether the seeking of an injunction by an SEP holder committed to licensing on FRAND terms amounts to an abuse of dominant position under the Competition Act?
- (iii) Whether MaxSmall was a “willing licensee”?



- (iv) Whether the DG exceeded its jurisdiction and mandate by initiating an investigation against the Indian handset suppliers for potential price-fixing, absent a prima facie order passed by the CCI under Section 26(1) of the Competition Act?
- (v) Whether the BCA resolution can be held to be a price-fixing agreement in violation of Section 3(3) of the Competition Act or whether a trade union acting on behalf of small buyers / purchasers is simply engaging in collective bargaining which cannot be held to violate the Competition Act?

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