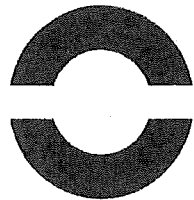


General Notice No. 1733 of 2021



**competition  
commission**

shaping markets, furthering progress

**Decision of the Competition  
Commission**

CC/DS/0025

In the matter of: -

**INV 034: Pricing of Mobile Telephony Services**

20 April 2021

**THE COMMISSION: -**

Mr Mahmad Aleem BOCUS	-	Chairperson
Mr Alberto MARIETTE	-	Vice-Chairperson
Mr Candhayalallsing SEEBALUCK	-	Commissioner
Mrs Vedwantee BIKHOO	-	Commissioner

**For Cellplus Mobile Communications Ltd/Mauritius Telecom Ltd**

Me Velamah Cathapermal, of Counsel  
Me Megnah Jeetah, of Counsel  
Me Jeeshna Radhakissoo, Attorney at Law

**For Emtel Ltd**

Me Anwar Moollan, Senior Counsel  
Me N Mamode Ally, of Counsel  
Me F Hajee Abdoula, Attorney at Law

**Having regard to the Competition Act 2007,**

**Having regard to the Competition Commission Rules of Procedure 2009 as amended,**

**Having regard to the guidelines published under section 38 of the Competition Act 2007,**

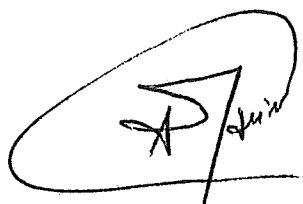
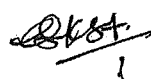


**Having regard to the Final Report of the Executive Director dated 26 May 2017  
(hereinafter the "Final Report"),**

**Having regard to the submissions of the parties,**

**WHEREAS:**

**1. Introduction**

- 1.1** Following an investigation into the pricing for mobile voice call services by the three local mobile telephony service providers in Mauritius, the Executive Director submitted a Final Report to the Commission pursuant to section 51(2) of the Competition Act 2007 (the "Act") for determination.
- 1.2** In his Final report the Executive Director made a number of recommendations in respect of Cellplus Mobile Communications Ltd (hereinafter referred to as "Cellplus Ltd").
- 1.3** The Commission convened a hearing on 24.02.2021. At the hearing Cellplus Ltd was assisted by its legal representatives. Emtel Ltd as an interested party also put in an appearance and was represented by counsel.

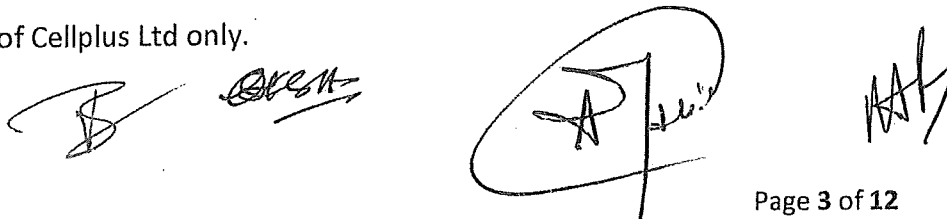
1.4 At the hearing learned counsel for Cellplus Ltd raised a preliminary objection and argued that the hearing of the present matter should not be proceeded with on the merits on the grounds of undue delay and breach of the principles of natural justice.

1.5 Learned counsel for Emtel submitted on a number of issues. On the issue of alleged breach of the rules of natural justice and undue delay, he took the same position as Cellplus Ltd.

## 2. Background

2.1 In August 2015, the Competition Commission initiated an investigation into the pricing for mobile voice call services and bearing reference INV034 (hereinafter referred to as the "Investigation") by the three mobile telephony providers currently operating in Mauritius, namely Cellplus Ltd, Emtel Ltd (hereinafter referred to as "Emtel") and Mahanagar Telephone (Mauritius) Ltd (hereinafter referred to as "MTML") respectively. The above companies provide mobile telephony services, and they operate in the Republic of Mauritius.

2.2 In his Final Report, upon completion of the Investigation, the Executive Director concluded *inter alia* that as regards the on-net and off-net mobile telephony voice call services, Cellplus Ltd was in a position of dominance pursuant to section 46(3) (a) of the Act and he expressed the view that the latter's conduct in relation to the monopoly situation arising in this segment of the mobile telephony service under section 46 (1)(b) of the Act 'has or is likely to have adverse effects on the efficiency, adaptability and competitiveness of the economy of Mauritius by way of anticompetitive foreclosure as defined under the CCM Guidelines, thereby residing in s.46(3)(d) of the Act'. The Executive Director recommended remedial measures to the Commission in respect of Cellplus Ltd only.



The page concludes with four handwritten signatures in black ink, arranged horizontally. From left to right: a stylized signature, a signature that appears to be 'BREN', a large signature with a prominent loop, and a signature that appears to be 'HAB'.

- 2.3** Prior to the hearing on 24.02.2021, Cellplus Ltd gave advance notice in writing to the Commission that it was going to raise a preliminary objection at the hearing to the effect that the present matter should not proceed to determination on the merits on the grounds of undue delay and breach of the principles of natural justice. It is the contention of Cellplus Ltd that the Final Report of the Executive Director dated 26 May 2017 is based on figures for the period 2012 – 2015 and that same has now become obsolete. Cellplus Ltd submitted that serious prejudice will be caused to it if the hearing is proceeded with after more than 4 years since the completion of the Final Report of the Executive Director.
- 2.4** Cellplus Ltd, both in its written and oral submissions, has expatiated lengthily on the principles of natural justice and the law governing undue delay as they apply to the case in hand.
- 2.5** However before considering the submissions of Cellplus Ltd, it is worth recalling briefly the following salient facts which arose in the context of the investigation into the present matter by the Executive Director.
- 2.5.1** In or about September 2017, Emtel Ltd requested from the Competition Commission communication of information of a confidential nature submitted by Cellplus Ltd to the Executive Director for the purposes of the Investigation. Cellplus Ltd objected to the disclosure of its information to Emtel and this was made a live issue.
- 2.5.2** Cellplus Ltd has in its submissions given a detailed account of the above issue to which it has referred as the 'Confidentiality Issue'. Cellplus Ltd has referred to the various exchanges between itself and the Competition Commission in relation to the issue of disclosure of its confidential information and to the court proceedings brought by it by way of an application for injunctive relief before the Judge in Chambers followed by an application for judicial review on the same issue.

OKA:

2.5.3 The Judicial Review application was consequently withdrawn by Cellplus Ltd on the basis of an undertaking given in Court by the Competition Commission to have a meeting with Cellplus Ltd to sort out the issue of confidentiality. The said meeting took place on 16 July 2020. The outcome of the meeting was that the communication of confidential information of Cellplus Ltd to Emtel Ltd by the Executive Director no longer arose as the latter had concluded in the context of his investigation that there was no ground to consider Emtel Ltd as a dominant operator; so much so that Emtel Ltd was no longer part of the Investigation.

2.5.4 Once the 'confidentiality issue' was thrashed out with Cellplus Ltd, the Competition Commission convened Cellplus Ltd for a hearing on the conclusions and recommendations of the Executive Director as given in his Final Report.

### 3. The submissions of Cellplus on its preliminary objection

3.1 Learned counsel for Cellplus Ltd submitted that the Commission is bound by the principles of natural justice and the need for expeditious determination of any matter before it in virtue of the guidelines on the procedural rules of the Commission itself.

3.2 It was further submitted on behalf of Cellplus Ltd that in the absence of a specified statutory time limit within which a hearing has to take place as is the case under the Act, section 38(2) of the Interpretation and General Clauses Act (the "IGCA") comes into play. Section 38(2) of the IGCA provides that: "*Where no time is prescribed or allowed within which an act or thing is required to be done, that act or thing shall be done without unreasonable delay, and as often as due occasion arises.*" Reference was also made to similar pronouncement in the case of **Collector of Land Revenue South West District Penang Appellant And Kam Gin Paik And Others Respondents [1986] 1 WLR 412**, decided by the Privy Council on appeal from the Federal Court of Malaysia

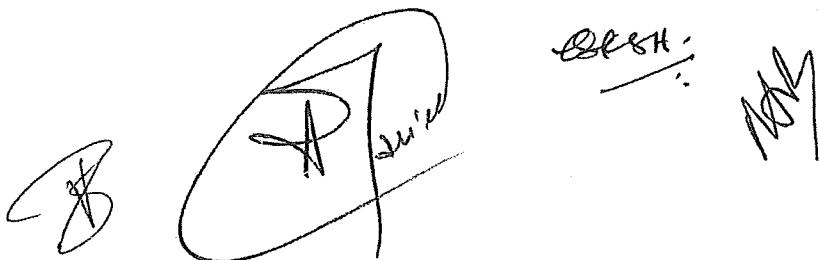
where under section 38 of the Interpretation and General Clauses Ordinance 1948 of Malaysia, it is provided that *"where no time is prescribed or allowed within which anything shall be done, such thing shall be done with all convenient speed and as often as the prescribed occasion arises."*

3.3 Learned counsel also referred to a number of other cases (which in our view need not be reproduced here). Suffice it to say that the cases cited in submission on behalf of Cellplus Ltd fully support the proposition that judicial proceedings must be fair, and that fairness requires that the proceedings be held without undue delay and in compliance with the rules of natural justice. It may be apposite to add that in the case of **Venkatasami M v The NTA & Anor [2017 SCJ 52]**, it was even held that inordinate and unconscionable delay unquestionably amounted to *"procedural impropriety"* in the decision-making process.

3.4 Further emphasis was laid in submission on the sacrosanct nature of the requirement to give a litigant a fair hearing within a reasonable time, as enshrined in Article 10(8) of the Constitution of Mauritius. Learned counsel argued that although section 10(8) has been laid down in the context of criminal provisions, the principle has been extended to civil proceedings as well and she cited in support the cases of **Development Bank of Mauritius Ltd v Francis and Ors [1998 SCJ 66]**; **Bundhoo v Bhugoo and Anor [1993 MR 243]** and **Bundhoo v Bhugoo and Anor [1995 MR 177]**."

#### 4. The submissions of Emtel Ltd:

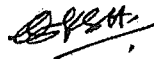
4.1 Me Anwar Moollan, Senior Counsel for Emtel Ltd stated from the outset that he wished to put on record the issues which his client was facing. These were the issues of delay, prejudice, jurisdiction and disclosure of information, inter alia.

The image shows several handwritten signatures and initials. On the left, there is a signature that appears to be 'A' with a flourish. In the center, there is a large, stylized signature that looks like 'A' with a vertical line through it and some scribbles. To the right of this, there are initials 'BESH' with a horizontal line underneath. Further right, there are initials 'MM' written in a bold, slanted font.

4.2 Learned Senior Counsel stated in submission that his position was the same as that of Cellplus Ltd on the issue of delay and that he shared the latter's submission on this specific issue. He pointed out that the Executive Director opened his investigation on the 7<sup>th</sup> August 2015 and that his report was based on figures which date back to the period 2011 – 2015; so much so that it would not be proper, in his submission, to act on such figures in view of the rapidly evolving nature of the market. He explained that it was important to know how many persons have got a mobile with two Sim cards and this since when, in what year and for what purpose. He added that it was equally important to know if this had changed and if so, at what rate. He added that another important factor to be taken into account is the evolution in call making over the internet to see how it has evolved over time until 2021. He stated that he concurred with Cellplus Ltd that 2 years is a reasonable timeline to call a hearing although he personally considered that it should have been shorter. He further stated that the issue of delay was coupled with that of prejudice resulting to his client as a result of the delay.

4.3 The second point made by learned Senior Counsel was on the issue of jurisdiction, but it was not clearly explained. The submission made on this issue has therefore been reproduced verbatim from the transcript of proceedings which were digitally recorded. It reads as follows- *'...that I do have as an issue is the issue of jurisdiction which I had raised fairly and squarely. In fact, it is my first point and now that first point, the issue of, this will get straight into the problems of the Executive Director and the solutions that he has done. Shortly speaking, you may not have a solution which is harmful to the other parties.'*

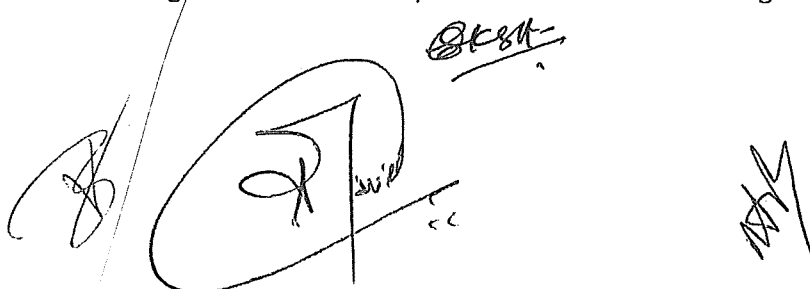
4.4 Learned Senior Counsel also had quarrel with the Final Report because according to him past conduct had not been addressed and the issue of the counterfactuals has not been properly addressed in the report.

A large, stylized handwritten signature or set of initials, possibly 'A. J.', enclosed in a circular scribble.A small handwritten signature or initials, possibly 'A. J.', with a horizontal line underneath.A small handwritten signature or initials, possibly 'A. J.', written in a cursive style.

- 4.5 Me Moollan, S.C. further stated that his client was given a right to certain information. He mentioned a letter dated 19<sup>th</sup> of September 2017 but did not say more about this letter before adding that this right of his client has not been complied with. He went on to say that he was not aware of that information which has been relied upon by the Executive Director. He expressed the view that the issue of information has not been thrashed out and that too is a preliminary issue, adding that it is for the Chairperson and the Commissioners to decide at what point in time they would address the issue.
- 4.6 Learned Senior Counsel expressed the wish to cross examine the members of the team who have carried out the investigation in the present matter so that according to him he might point out what he believed to be certain issues which at the end of the day this Commission will have to adjudicate upon.
- 4.7 Learned Senior Counsel also stressed that his submissions were made as an affected party by any decision that the commission would make. He explained that the fact that no remedy was being asked against Emtel Ltd does not mean that it is not affected by the remedies prayed for in the Final Report. He submitted that it is an extremely important point as a factual basis.

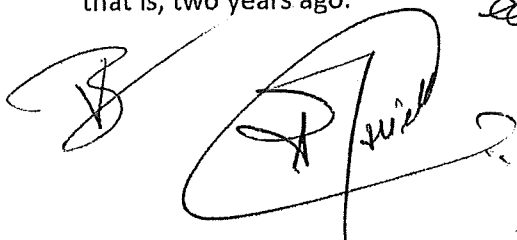
## 5. Determination

- 5.1 The scope of the present exercise is limited to the determination of the preliminary objection raised by Cellplus Ltd with regard to the delay in holding the present hearing and the prejudice which such delay is likely to cause. Submissions have been made on issues other than delay and prejudice; more so on behalf of Emtel. Suffice it to say that no pronouncement will be made one way or another on these submissions at this stage. We also wish to point out that MTML represented by its manager did not offer any submissions at the hearing.

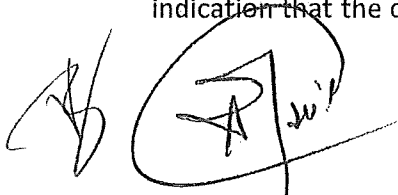
The bottom of the page contains several handwritten signatures and initials. On the left, there is a large, stylized signature that appears to be 'S. Moollan'. To its right, there are smaller initials, possibly 'SKB'. Further right, there is another signature that looks like 'M'. There are also some other scribbles and marks scattered around these signatures.



- 5.2 The Commissioners have given anxious consideration to all the submissions of the parties in so far as they relate to delay and prejudice; and also due process and, natural justice, having regard to the facts of the present case.
- 5.3 One striking feature of the matter in hand is that the present hearing is based on a Final Report drawn up by the Executive Director which is dated 26 May 2017. The hearing in this matter is being held some 4 years later. Due process requires that once it is seized of a matter, the commission must proceed to determine the matter within a reasonable delay. Due process is a fundamental requirement in any judicial, quasi-judicial or administrative context; and the context of competition law is no exception to this fundamental rule. We unreservedly and fully subscribe to the submissions in law supported by references to related cases by counsel with regard to the question of delay and prejudice and due process of the law, which submissions and references have been summarised above. We have also taken into account the propositions imported from reliable external sources to which learned counsel for Cellplus has made reference. These sources, though persuasive and relevant, only restate principles already enshrined in our law and already expounded upon in the pronouncements made by our courts, as illustrated extensively by the cases referred to in submission and which we need not reproduce here. Suffice it to say that we are satisfied that a fair hearing cannot take place now on the basis of a report finalized as far back as 2017; all the more so as in this specific case we are dealing with a fast-changing market in a segment of activity which is also driven by constant technological innovations and new technologies. Further as rightly pointed out by learned Counsel for Cellplus Ltd, when the Executive Director in his report expressed the opinion that "*... the scope for demand-side substitutability between mobile voice calls and calls placed over OTTs is very limited at this stage and for the foreseeable future*" he went on to say that *does not expect circumstances to change sufficiently within the next two years.*" We note that this estimated period of two years already lapsed in 2019, that is, two years ago.



- 5.4 We need however to say a word about this delay. In the context of this investigation, Emtel Ltd sought to obtain from the Executive Director information confidential to Cellplus Ltd which had been submitted by the latter for the purposes of the investigation. Cellplus Ltd raised objection to this request of Emtel Ltd. This became a highly sensitive issue whereby there were various exchanges between Cellplus Ltd and the Competition Commission on the disclosure or otherwise of its confidential information. The issue culminated into court proceedings brought by Cellplus Ltd against the Competition Commission by way of an application for injunction before the Judge in Chambers to restrain the Competition Commission from disclosing its confidential information. There was also an application for judicial review on the same issue.
- 5.5 The Judicial Review application was consequently withdrawn by Cellplus Ltd. However, until such time as this court case would have been removed, it would not have been proper for the Commission to proceed to the hearing all the same. We say so because the hearing is based on a report which contains *inter alia* information confidential to Cellplus Ltd. This is precisely the information to which Emtel Ltd wanted to have access. It cannot therefore be said, as submitted by Cellplus Ltd, that there was nothing which prevented the Commission to hear the matter as there was no court order prohibiting it from doing so. The short answer to this is that there never was in the first place any prayer from the court for such an order. In any event, being given that the case was brought by Cellplus Ltd itself, the question of such an order does not even arise. Further, despite the fact that at one stage Emtel Ltd was no longer a main party as such with regard to the Executive Director's investigation, it nevertheless remained an interested party with regard to the determination in due course. And as an interested party it has intervened in the present proceedings. It is quite telling that at the hearing learned Senior Counsel for Emtel Ltd has emphasised that the 'right' of his client to this confidential information has not been complied with. There can be no better indication that the confidentiality issue is highly likely to be made a live one by



BCSA



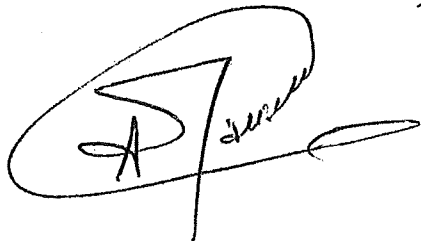
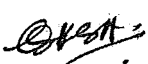
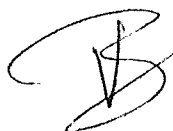

Emtel Ltd in the context of a hearing on the merits in this matter .In this regard it may be quite apposite to note that the issue of confidential information of Cellplus Ltd not communicated to Emtel Ltd has for a fact been raised here by its counsel although as we have said earlier, we do not propose to address this issue in the context of the preliminary objection subject matter of the present determination

**5.6** Additionally whenever the Commission publishes any of its decisions as required under section 18 of the Act, confidential information which is contained in the decision is removed and it is the edited version which is published. How then could the Commission be legitimately expected to serenely hear and determine a matter when confidential information subject matter of the said hearing was also the subject matter of a live issue submitted to a court of law for determination and that the case was still pending?

**5.7** In the premises, we are of the considered opinion that it cannot by any stretch of the imagination be said that the said court proceedings were not all related to the hearing of this matter on the merits, as submitted on behalf of Cellplus Ltd. In fact, it is upon the confidentiality issue having been thrashed out with Cellplus Ltd that the Commission has proceeded further with this matter.

**5.8** From the foregoing, whilst considering that it would be unfair to proceed with the hearing on the merits of this matter on the basis of a 2017 report, the Commission is nonetheless reluctant to consider the delay as culpable delay in view of the circumstances described above. The delay is just the result of the circumstances that have already been explained. Be that as it may, it is the right to a fair and public hearing within a reasonable time which is the overriding consideration.

**6. Decision**

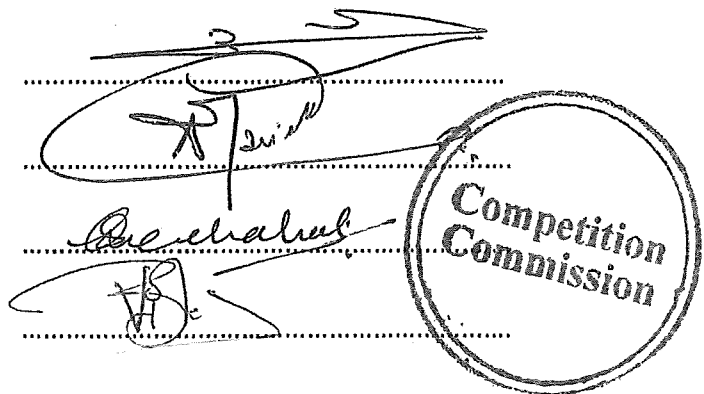
- 6.1 For all the reasons given above the Commission has reached the considered conclusion that the present proceedings should in fairness to the parties be stayed. We order accordingly.
  
- 6.2 The stay of the present proceedings however does not put an end to the competition concern raised by the Executive Director in his Final Report. The issue has to be investigated further on the basis of fresh data and evidence. We accordingly decide that the matter bearing reference INV034 on Pricing of mobile telephony services be remitted back to the Executive Director for him to update his analysis and his report and make such fresh recommendations as he may deem appropriate.

Mr. M.A. Bocus (Chairperson)

Mr. A. Mariette (Vice-Chairperson)

Mr. C. Seebaluck (Commissioner)

Mrs. V. Bikhoo (Commissioner)



The signature block contains four handwritten signatures, each on a dotted line. The first signature is circled. To the right of the signatures is a circular stamp with the text "Competition Commission" inside.

**20 April 2021**