

Telegraph Act. It is aggrieved by the imposition of a penalty of Rs. 50,000/- per connection for alleged violation of license conditions regarding verification of subscribers in its M.P. Service Area.

Briefly stated the facts of the case are as under:

Department of Telecom (DoT) of the respondent, U.O.I., vide its circular dated 09.08.2012 issued instructions regarding tele-verification of subscribers before activating their connections, to its licensees. A penalty of Rs. 50,000/- was envisaged for every SIM card¹ that was found to be pre-activated i.e. activated before due verification of the subscriber. These guidelines were to come in force in three months from the date of the circular i.e. from 09.11.2012.

We may explain the process of tele-verification of a subscriber briefly in order to put the facts in their proper perspective. When a customer wants a mobile connection, it has to fill a form called CAF (Customer Acquisition Form) giving details of the customer. It has also to provide proof of its identity, address etc. It is then issued a SIM card which is yet to be activated. When this SIM card is inserted in a handset, it cannot be used to make or receive any calls other than those to the service provider who issued the SIM card. The service

¹ Subscriber Identity Module card which has to be inserted in the mobile handset for it to work as a mobile phone

providers provide a short code² that is used to talk to an operator who verifies the details of the subscriber as filled by it on the CAF. After the successful verification of the subscriber, its mobile connection is activated enabling it to make outgoing calls and receive incoming calls as well as use other services as subscribed.

On 07.12.2012, the respondent sent an e-mail to the petitioner asking it to provide the details of the short-code used for tele-verification and also the Call Data Records (CDRs) of all the calls made to this short code during the period from 09.11.2012 to 07.12.2012. Subsequently the respondent, vide e-mail dated 31.12.2012, informed the petitioner that on analysis of the CDRs it was found that a single IMEI³ was used multiple times for activating multiple MSISDNs⁴. The petitioner was asked to explain within a week why the same should not be considered as a violation of the clause 3(vi) of Circular dated 09.08.2012. A reminder was also sent by the respondent on 11.01.2013. On 30.01.2013, the respondent sent another e-mail to the petitioner asking it to provide the CAFs corresponding to 5 IMEIs that had highest number of

² Short codes are different and shorter than the normal mobile numbers and are allocated for various special services.

³ The **IMEI** (International Mobile Station Equipment Identity) is a unique number assigned to every mobile phone sold via official channels.

⁴ Mobile Station International Subscriber Directory Number (**MSISDN**) is a number used to identify a mobile phone number internationally. This number includes a country code and a National Destination Code which identifies the subscriber's operator. A MSISDN is allotted corresponding to each SIM card and simply put, is the mobile number.

activations, within 10 days. As the petitioner did not supply the CAFs , a couple of reminders were sent by the respondent on 10.02.2013 and 27.02.2013.

In response to the letters of the respondent, the petitioner replied and submitted as under:

“1.The instructions on verification of New Mobile subscriber has come into effect from 9th Nov 2012, we all are still in the initial phase of implementing it on ground, the challenges faced are enormous assuming the geography & population spread of our LSA.

2.The observations made in your mail are a learning for us as well, because this kind of analysis was never done at our end. But taking the cognizance we have already issued explanation letters and notices to our Sales Channel partners for the observations raised.

3.In the rural & up country markets, it has been observed that the subscribers are not very conversant with calling the call centre as per the new guidelines and they request the retailers / point of sale (POS) Executive to insert the SIM card in their mobile and make the call, while the actual verification is done by the subscriber him/herself, but the IMEI of handset of retailers /point of sales (POS) Executive is registered on the CDR.

4.We are fully committed to follow the guidelines in letter & spirit, but will request for time & consideration from the Licenser. As there are many facets of the guideline which will take time to sink in, as amply evident from the observation raised.

5.As to the details requested corresponding to MSISDNs in the attached list, the complete details are readily available with us,

but in the light of points raised above will request for reconsideration on the observations made in earlier mails. “

These submissions of the petitioner were not accepted by the respondent and it reiterated the demand for CAFs on 27.02.2013. Vide e-mail dated 28.02.2013, the petitioner requested the respondent to reconsider its submissions and confirmed that the CAFs and supporting documents for all the MSISDNs were available with it and will be shared at the earliest. The explanation given by the petitioner was again rejected by the respondent on the same day and it issued a show cause notice asking the petitioner to explain why the 2151 CAFs in question should not be treated as missing and penalties imposed accordingly. After a couple of reminders, when the petitioner failed to submit the CAFs, the respondent vide the impugned demand letter dated 09.04.2013 imposed a penalty of Rs. 10,75,50,000/- for violation of clause 41.14 of the license agreement and under clause 3 (vii) of the respondent's instructions dated 09.08.2012 that provides for a penalty of Rs. 50,000/- per connection in case of sale of Pre-activated SIM cards. The petitioner represented against the demand notice on 16.04.2013 which was rejected by the respondent.

Instructions on verification of new subscribers were issued by DoT on 09.08.2012 in terms of the clause 41.14 of the license agreement. Para 3(vi) of these instructions mandates tele-verification of the subscriber. Clause 3(vii) of

these instructions provides that pre-activated SIM cards are not sold, and for a penalty of Rs. 50,000/- per connection in case of pre-activated SIM cards.

These clauses read as under:

“3(vi) After the activation of SIM, the subscriber shall be at least tele-verified. It may be ensured that while making the calls for tele-verification, details may be asked from the subscriber and verified against the details provided in the database. It may also be ensured that unless tele-verified, the subscriber is not able to make any type of call, except to the operator. The incoming call will remain barred before tele-verification.

3(vii) Pre-activated SIM card is not to be sold. In case of sale of pre-activated SIM cards a penalty of Rs. 50,000/- per connection shall be levied in addition to immediate disconnection of mobile connection, as and when detected. Pre-activated connection means that the SIM card available at point of sale or in possession of any other person is in such a condition that it is possible to make/receive calls/SMS without activation as per procedure mentioned in para (iv) above. Further, in case it is established that the date of activation of SIM card is prior to actual sale of SIM card, then it shall be treated as a sale of pre-active connection. Also, if for the CAR Audit/investigation, the CAF is not supplied to TERM cell within given time frame (missing CAF cases in CAF audit), the connection shall be treated as pre-activated. “

A reading of clause 3(vi) shows that there is no condition that the tele-verification of the subscriber cannot be done from the same hand set (having same IMEI). It only requires that details of the subscriber be verified against the details provided in the database. However, in terms of the clause 3(vii), if a CAF is missing, the connection is to be treated as pre-activated. The purpose

of the clauses is clearly that before a SIM is sold, the CAF must be filled and before the SIM is activated for all type of calls the details filled in the CAF and as available in the database must be verified telephonically by an operator. Though the verification of multiple numbers from the same handset may raise a doubt, it is quite plausible that the person at the point of sale may facilitate the verification by using its own handset to make the call to the operator and asking the subscriber to talk. Therefore, only question that needs to be answered in the present case is whether the CAFs were filled prior to the sale of the SIM cards or not and whether the respondent is justified in imposing the penalties as per impugned demand.

The case of the respondent in imposing the penalty, as made out from para 24 of its reply, is not that tele-verification calls were made from the same IMEI but that sufficient time was given to the petitioner to provide the CAFs which it failed to do in spite of many reminders. Para 24 of the reply of the respondent is as under:

“24. It is also pointed out that the penalty imposed in the Demand Notice dated 09.04.2013 was not issued for using single IMEIs for multiple activations. However, the analysis was used to identify the SIMs /connections issued without proper verification and the penalty notice dated 9.04.2013 was issued to petitioner on failure to submit the CAFs of the SIMs / connections identified by analyzing the CDRs, even after repeated reminders and reasonable opportunity and time provided to the petitioner to furnish the same. “

The case of the petitioner on the other hand is that the requisition for the CAFs did not come from the official channel of DoT till 09.04.2013 and all e-mails received prior to that were from a personal e-mail ID. It has also pleaded that its nodal officer was on leave for some time due to personal reasons and the management was undergoing some changes.

Be that as it may, the fact of the matter is that the respondent has taken the non-supply of CAFs as missing CAFs and , therefore, the SIMs in question as pre-activated. This Tribunal is of the view that in imposing penalties, there ought to be a differentiation between a mere procedural delay and a substantive non-compliance with verification norms. In the absence of such a differentiation, the very purpose of verification of subscribers, which is the national safety and security, will be defeated and the verification exercise will just become a revenue generation exercise. In this regards, the Tribunal in a recent judgement⁵ in Reliance Vs. UOI delivered on October, 28, 2015 observed as under:

“It is thus well settled that CAF audit is a function of national safety and security. And the penalty for failure to comply with the departmental guidelines in filling up the customer application form and collect of the mandatory PoI and PoA of the customer is meant to be a deterrent for the service provider to ensure the compliance with the guidelines. The corollary is that the CAF audit is **not** an exercise for

⁵ Reliance Telecom Limited Vs. UOI, petition no. 24 of 2013, delivered on 28.10.2015

generation of revenue and if it is used to that end it would be difficult to defend the action of the licensor as justified or valid. It, thus, follows that all instructions issued for the purpose of CAF audit should have a co-relation with its object and should also be followed in practice to promote the object and not to defeat it.”

With regard to the timelines followed by the TERM Cell of the respondent, the Tribunal observed :

“In a number of cases we have observed that the timelines prescribed for the service provider are applied with much greater firmness than the timelines relating to the TERM Cell. But that is only an aside and not the issue here. What needs to be pointed out here is that the timelines seem to be based on the assumption that everything proceeds at all times like a clock-work. In practice, however, that is not always so. The timelines fixed by office memorandum does not take into account and make allowance for force majeure conditions or even situations arising from business contingencies. The number of CAFs with a telecom service provider in a service area may run into several lakhs. The service provider may not have the wherewithal for the safekeeping of all the CAFs and it may outsource the storage of CAFs to some specialised agencies having warehouses for sufficient storage space. It is possible that the CAFs kept in the warehouse may be irretrievably damaged due to fire or floods or some similar natural calamity. In that case the service provider may never be able to produce the CAFs asked for by the authorities

unless those are reconstructed by getting hold of the individual subscribers. It may sometime happen, as in the present case, that due to business contingencies the service provider may not be able to submit the CAFs within the timelines laid-down in the above mentioned office memorandum. The Tribunal earlier came across a case where some dispute arose between the service provider and the agency managing the warehouse and the latter obtained an injunction order from the civil court restraining the service provider or its agents from even coming near the warehouse. In those circumstances, the service provider was naturally unable to submit the CAFs demanded by the TERM Cell within the timeline stipulated in the office memorandum and it could produce the CAFs only when the injunction order was vacated after many months of litigation. In such cases, a rigid and mechanical adherence to the timeline fixed in the office memorandum does not only lead to unfair and unjust consequences for the service provider but actually defeats the very object of the CAF audits. The authorities deem their responsibility over by imposing penalty for the non-submitted CAFs but in reality those CAFs remain un-verified and it is possible that one of the unverified CAFs may be hiding behind it some undesirable subscriber of mobile services and who would remain undetected for want of a proper verification of the CAF.

In our view, therefore, the office memorandum fixing the timelines for the monthly CAF audits is deficient in not allowing for contingencies in which the service provider may not be able to submit the CAFs by the due date for very good and valid reasons. We further find that the office memorandum is followed by the TERM Cell in a misguided manner that has no regard for the object and

purpose of CAF audit but actually defeats the object of CAF verification.” (emphasis supplied).

We could have understood the plea of the respondent in regard to delay in submission of CAFs if due to this delay it was no longer in a position to verify whether the CAFs were obtained prior to the sale of the SIM cards in question. However, we note that the petitioner and all similarly placed service providers are required to provide subscriber data base to the Licensor and designated authorities in a format prescribed in Annexure-II to the circular of the respondent dated 09.08.2012. This database is to be provided contemporaneously at the end of the month in which the SIM cards are activated. During the course of hearing, the Tribunal vide order dated 06.10.2015, directed the petitioner to file a supplementary affidavit stating in clear and unambiguous terms that in compliance with the provisions of this circular, it had filed the details in regard to the 2151 CAFs/SIM cards in question contemporaneously at the end of the month in which these were activated. As per the affidavit dated 12.10.2015, filed by the petitioner, the petitioner had submitted the details in regard to 2131 SIM cards at the end of the month. As per it, 6 SIMs for which the verification was negative, were never activated and ,therefore, not reported and 14 CAFs could not be detected in the database as they might have churned in the same month. It was further stated that no discrepancy between the database furnished to the authorities and the respective CAFs was detected. The relevant part of the affidavit is as under:

“3. I state that upon verification by the team of responsible officials of the petitioner it has been found that in compliance with the provisions of the circular dated 9.8.2012 the Petitioner had submitted details as enumerated in Annexure-2 to the circular in regard to the 2131 CAFs/Sim Cards in question contemporaneously, the is to say, at the end of the month in which the Sim Cards in question were verified by the activation officer. For 6 CAFs/Sim Cards, though tele-verification calls were received, however, as they were negatively verified, these numbers were never activated and hence not reported. As far as balance 14 CAFs/Sim Cards are concerned, the same could not be detected from the database of the Petitioner during the concerned as they might have been churned in the same month.

4. That I further certify that upon examination by team of responsible officials of the Petitioner Company, no discrepancy between the data base furnished to the authorities and the respective CAFs could be detected.”

We note that this database contains all the relevant details necessary to establish whether the CAFs were filled or not. Moreover, since the database was contemporaneously available, if the details match with the CAFs, it would establish that these were indeed available with the petitioner at that time and not fabricated later. We further note that even before this petition was admitted this Tribunal vide order dated July 22, 2013, asked the respondent, UOI, to consider the documents and materials furnished by the petitioner and take a decision in this regard. The relevant part of the order is as under:

“Even before we admit this Petition or pass any substantive order, we think that better course would be to permit the Petitioner to review the Customer Application Forms

and other related materials demanded by the concerned authorities by tomorrow. Union of India will be well advised to consider the documents and materials furnished by the Petitioner and to take a decision in that regard. Needless to say in course of the examination in case it requires any further information the same would be submitted within the time allowed by them.”

An officer of the respondent, however, did not accept the same as he thought that there was certain ambiguity in the Tribunal’s order and observed that it required some interpretation.

In Reliance Vs. UOI above, the Tribunal has held that in case the service provider does not submit the CAFs within time without assigning any reason but wishes to submit them beyond time, the TERM Cell should still examine the CAFs to check if those are in conformity with the guidelines, subjecting of course the service provider to some penalty for the procedural lapse. While finding the petitioner liable to pay penalty for procedural lapse at the rate of 15% of the impugned demand, the respondent was directed to take a decision in regard to the CAFs in accordance with law. The order of the Tribunal in this regard is as under :

“.....Further, in case the service provider does not submit the CAFs within time without assigning any reason but wishes to submit them beyond time, the TERM Cell should still examine the CAFs to check if those are in conformity with the guidelines, subjecting of course the service provider to some penalty for the *procedural lapse*. The DoT will be well advised to devise a scheme making a distinction between any procedural lapses by the service provider in the monthly audit process and the substantive non-compliance with the guidelines

for filling up the CAF and the necessary documents (PoI and PoA) needed as enclosures to it. Needless to say, the penalty for procedural lapses would be at much lower rates than the penalty for substantive violations of the guidelines. Further, in case the service provider does not submit the CAFs without any good reason, the authorities should not close the case by simply imposing penalty for the non-submitted CAF. The service provider should be compelled to produce the CAF or to give reason for non-production. In any event all efforts should be made to ascertain the identity of the subscriber, either by means of the data base maintained by the service provider or, if necessary, even by contacting the service provider personally.

In the facts of the case we answer the question framed above in the affirmative and hold that the CAFs for the months of July to October 2012 now being submitted by the petitioner need to be examined by the TERM Cell to judge their compliance with the guidelines. However, as noticed above there is nothing on record to show that the petitioner intimated the TERM Cell about the reason for non-submission of the CAFs within the time as directed in the requisition letter by the TERM Cell and requested for any extension of time for submission of the CAFs. The petitioner must, therefore, face the penalty for the procedural lapse of the audit process as explained above. We accordingly set aside the impugned demands of penalty and direct that if the petitioner deposits fifteen per cent (15%) of the impugned penalty amount and submits the CAFs in question within a fortnight from to-day, the TERM Cell authorities will duly examine the CAFs and take a decision in regard to those CAFs in accordance with law.”

In the present case, we are not convinced with the reasons for delay in submission of CAFs advanced by the petitioner. Since the facts of the present case are similar to the above case, we find the petitioner liable to pay 15% of the impugned demand for delay in submission of CAFs without sufficient reason. At the same time, we find that the respondent can very

well examine the CAFs submitted by the petitioner and find out whether it is a case of pre-activated SIM cards or not. We accordingly set aside the impugned demands of penalty and direct that if the petitioner deposits fifteen per cent (15%) of the impugned penalty amount and submits the CAFs in question within a fortnight from to-day, the TERM Cell authorities will duly examine the CAFs and take a decision in regard to those CAFs in accordance with law.

In the facts of the case, there will be no order as to costs.

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(Aftab Alam)
Chairperson

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(Kuldip Singh)
Member

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(B.B. Srivastava)
Member