

COMPETITION COMMISSION OF INDIA

Case No. 04 of 2020

In Re:

Travel Agents Association of India,
2-D, Lawrence and Mayo House,
276, AK Nayak Marg, Dr. D. N. Road,
Azad Maidan, Fort,
Mumbai, Maharashtra - 400001

Informant

And

**Department of Expenditure, Ministry of Finance,
Government of India,**
Room No. 76,
Ministry of Finance,
New Delhi – 110001

Opposite Party No. 1

Balmer Lawrie & Co. Ltd.,
21, Netaji Subhas Road,
Kolkata – 700001

Opposite Party No. 2

Ashok Travels and Tours
3rd Floor, Jeevan Vihar Building,
3, Sansad Marg,
New Delhi - 110001

Opposite Party No. 3

CORAM

Mr. Ashok Kumar Gupta
Chairperson

Ms. Sangeeta Verma
Member

Mr. Bhagwant Singh Bishnoi
Member

Order under Section 26(2) of the Competition Act, 2002

1. In the present case, an information has been filed by Travel Agents Association of India (“**TAAI/Informant**”), under section 19(1)(a) of the Competition Act, 2002 (hereinafter, the “**Act**”) against Department of Expenditure, Government of India (“**DOE/Opposite Party-1**”), Balmer Lawrie & Co. Ltd. (“**Balmer Lawrie/Opposite Party-2**”) and Ashok Travels and Tours (“**Ashok Travels/Opposite Party-3**”) alleging contravention of the provisions of Sections 3(4) and 3(1) of the Act.

Brief facts and allegations, as per information

2. TAAI, company incorporated under the Companies Act, 1956, is an association of travel agents with the primary objective to protect the interests of the travel and tourism industry and promote its orderly growth and development. To further this objective, TAAI liaisons with the Ministry of Tourism, Government of India.
3. DOE is the nodal department of the Ministry of Finance in the Central Government which oversees the public financial management system and matters connected or incidental to the finances of the Government of India.
4. Balmer Lawrie is a Government Company under the Ministry of Petroleum and Natural Gas, Government of India. Balmer Lawrie is stated to be one of the two exclusive travel agents which has been approved by DOE. Ashok Travels is one of the divisions of the India Tourism Development Corporation, a Government of India undertaking. Ashok Travels is stated to be one of the largest travel and tour operators in India providing other travel related services. Ashok Travels is the other travel agent approved by DOE.
5. On 24.03.2006, an office memorandum bearing No. 19024/1/E.IV/2005 was issued by DOE on the subject of "*Guidelines on Air Travel on Official Tours- Purchase of Air Ticket from Authorised Agents*" by which, it was stipulated that while utilizing air transport and the services of travel agents for booking air tickets, Government employees have to exclusively utilize the services of either Balmer Lawrie or Ashok Travels to the exclusion of other travel agents across the nation (“**Office Memorandum 1**”).

6. It has been stated that restricting the choice of government employees was opposed by the government employees and instances of many government employees using the services of private travel agents for booking of air tickets for official travels came to notice of DOE. They also received a large number of proposals from various administrative ministries of several PSUs and departments of the Government of India for grant of *ex post facto* relaxation in the guidelines issued for air travel and official tours *vide* Office Memorandum 1.
7. The objection raised by the end consumers was specifically indicated in Clause 2 of the subsequent clarificatory Office Memorandum issued by DOE on 19.07.2017 bearing No. 19024/22/2017- E-IV (“**Office Memorandum 2**”). Office Memorandum 2 revealed the desire of a large number of actual consumers *i.e.* the Government officials/employees for relaxation of the prescribed procedure for purchase of air tickets from authorised agents only. However, DOE rejected the choice of the actual consumers and directed the ministries and departments of the Government to continue to restrict the choice of the government employees to only Balmer Lawrie and Ashok Travels and stated that non-compliance with the extant guidelines would result in the rejection of the travel claims of the concerned employee.
8. *Vide* OM No. 19024/22/2017-E.IV dated 27.02.2018, it was decided that seeking relaxation of air travel guidelines pertaining to purchase of air tickets from authorised agents should have prior approval of the Secretary of the Administrative Ministry before referring the same to DOE. (“**Office Memorandum 3**”). Thereafter, the Ministry of Road Transport and Highways issued a Circular dated 28.02.2019, bearing No. N-20011/29/2016-E.II reiterating strict compliance of air travel guidelines in terms of Office Memorandum 1.
9. It has been alleged that due to such arbitrary decision of DOE mandating the procurement of the services of booking of air tickets only through Balmer Lawrie and Ashok Travels, the competition in the market for travel agent services for booking air tickets in India has been affected adversely by foreclosing the market for the private travel agents.

10. It has been submitted that the Commission in its previous decision in Case No. 39 of 2010 held that DOE is not an enterprise under the Act. It has been submitted that definition of the term 'enterprise' has evolved with time and there are judicial decisions which may be considered for fresh assessment for the purpose of the case. Reliance has been placed upon several judgments of the Hon'ble Supreme Court and Hon'ble High Courts to regard DOE as an enterprise. It has been stated that the conduct of DOE in restricting the procurement of air tickets to only authorised agents has a direct economic/commercial impact. As per the Informant, DOE is an enterprise which is undertaking economic activity in the procurement of air ticket services. Further, DOE is performing activities relating to economic /commercial activities, which in turn affects the provision of services by other travel agents.
11. It has also been stated that Government/Ministry of Finance is not a consumer as it does not avail the services or pay consideration for the same, rather it restricts the actual consumer, i.e. government employees who avail the services and pay consideration. The act of DOE could be viewed as any public procurement which has anti-competitive elements and are hit by the provisions of the Act.
12. Through Office Memorandums, it has been alleged that DOE has imposed an anti-competitive restraint on the private sector travel agents by restricting the choice of the government employees to services offered by Balmer Lawrie and Ashok Travels. By not allowing them to deal with private travel agents, DOE has indulged in refusal to deal under Section 3(4) and/or Section 3(1) of the Act. It has also been stated that scope of Section 3(1) is vast and has to be considered keeping in view the aims and objects of the Act by ensuring that the markets are not distorted and made anti-competitive by such agreements of the enterprises which cause appreciable adverse effect on the market or are likely to do so. Further, Section 3(1) is independent of the provisions of Section 3(3) and 3(4) and Sections 3(3) and 3(4) do not limit the scope of Section 3(1).
13. Based on the aforesaid facts and circumstances, TAAI has *inter-alia*, sought initiation of an enquiry under Section 26(1) of the Act against DOE, Ministry of Finance, Balmer Lawrie, and Ashok Travels for contravention of provisions of Section 3(4) and/or Section 3(1) of the Act.

Analysis of Commission

14. The Commission considered the information in its ordinary meeting held on 03.03.2020 and decided to pass an appropriate order in due course. Subsequently, an email dated 17.03.2020, has been received by the Secretary to the Commission, from the counsel for TAAI, wherein a request has been made to grant time till end of April, 2020 to submit more information in the matter, which according to TAAI, is not being able to be collected on account of spread of COVID-2019 virus in Mumbai. This information according to TAAI is relevant to establish abuse of dominance and pertains to information on approximate size of the total market for ticket/tour bookings in India for each segment *i.e.* air, railways, road travel and hotel bookings in terms of value of tickets/bookings sold during the last three years and approximate size of market for ticket/tour bookings in the same segment for the government sector stated to be monopolised by Balmer Lawrie and Ashok Travels. The counsel for TAAI has also requested for preliminary conference with the Commission before a decision on the existence of *prima-facie* case is formed by the Commission under the provisions of the Act.
15. The Commission notes that the information filed in this case does not have any allegations of abuse of dominance (Section 4) and pertains to alleged violation of Section 3(4) and Section 3(1) of the Act. Even otherwise for the reasons mentioned in subsequent paragraphs of this order, a case under Section 4 (abuse of dominance) of the Act would not be made out against DOE, Balmer Lawrie and Ashok Travels and therefore the Commission does not deem it fit to grant further time as sought by TAAI.
16. The Commission notes that analysis of allegations of TAAI require determination of the issues, namely, a) Whether DOE is an ‘*enterprise*’, within the meaning of Section 2(h) of the Act?; b) whether the agreement executed between DOE, Balmer Lawrie and Ashok Travels is in contravention of provisions of Section 3(4) of the Act read with Section 3(1) of the Act?; and c) whether the agreement executed between DOE, Balmer Lawrie and Ashok Travels is covered under Section 3(1) of the Act?.
17. The Commission notes that TAAI had earlier filed a case against Balmer Lawrie and Ashok Travels, being Case No. 39 of 2010 raising same issues. In the said case, TAAI, on similar facts, had sought quashing of Office Memorandum 1 issued by DOE for allegedly being arbitrary and anti-competitive and thus in contravention of provisions of

Sections 3 and 4 of the Act. *Vide* order dated 15.09.2010, the Commission closed the case under Section 26(2) of the Act. The main findings in the decision of the Commission in the said case are as under:

- a. The Department of Expenditure, Ministry of Finance, Government of India cannot be said to be engaged in any activity which relates to production, storage, supply, distribution, acquisition or control of article of goods or provision of services. Therefore, the DOE, Government of India is not covered under the definition of enterprise provided in Section 2(h) of the Act. The Government of India is the consumer of air ticketing services and a consumer is free to make a choice as far as selection of goods or services are concerned.
- b. There is no case of horizontal agreement under Section 3(3) of the Act. Office Memorandum 1 issued by the Department of Expenditure, Ministry of Finance, Government of India cannot be treated as an agreement on horizontal line. The Opposite Parties *viz.* Balmer Lawrie and Ashok Travels and the Government of India are not engaged in the business of identical or similar trade of goods or provision of service.
- c. The Government of India, being a consumer, is not producing anything, so it cannot be said that there is a vertical agreement between the Government of India and the opposite parties. The alleged refusal to deal has not resulted out of any vertical agreement.

18. The Commission notes that the decision of the Commission dated 15.09.2010, passed in Case No. 39 of 2010, was challenged by TAAI before the erstwhile Hon'ble COMPAT. The erstwhile Hon'ble COMPAT, *vide* order dated 26.09.2012, upheld the decision of the Commission. The main findings in the decision of the erstwhile Hon'ble COMPAT are as under:

- a. Balmer Lawrie and Ashok Travels have financial nexus with Central Government. They are also public sector undertakings where Central Government has stake. If the Government has to secure the services, it becomes a consumer receiving those services with the choice to select the entity to provide those services. Merely

because it is a Government, there is nothing in law from prohibiting it to be a consumer.

- b. The Commission is correct in holding that there is no vertical arrangement between Government of India and Balmer Lawrie & Ashok Travels.
 - c. Government Memorandum does not amount to an agreement. It is an internal administrative decision to deal with a particular agency in the matter of securing air tickets and thus cannot come within the mischief of any of the sub-sections of Section 3 of the Act.
 - d. An administrative decision to avail the services of Balmer Lawrie and Ashok Travels in first place is not an agreement. Secondly, it is not a trading activity.
19. It appears that the order passed by the erstwhile Hon'ble COMPAT was not impugned further and has attained finality.
20. The Commission notes that in the present case TAAI has alleged contravention of provisions of Section 3(4) and/or 3(1) of the Act against DOE, Balmer Lawrie and Ashok Travels. TAAI has once again alleged that by granting exclusive rights to Balmer Lawrie and Ashok Travels through Office Memorandums and subsequent circulars, DOE has foreclosed competition in the market for travel agent services for booking air tickets in India and has restricted choice of Government and public sector employees to only Balmer Lawrie and Ashok Travels.
21. With respect to the first issue whether DOE is an 'enterprise', the Commission notes that TAAI has stated that definition of the term 'enterprise' has evolved with time and there are judicial decisions which may be considered for fresh assessment for the purpose of the case. Reliance has been placed upon certain judgments of the Hon'ble Supreme Court and Hon'ble High Courts, to regard DOE as an enterprise. As per TAAI, DOE is an enterprise which is undertaking economic activity in the procurement of air ticket services.
22. The Commission notes that Section 2(h) of the Act defines the term 'enterprise' as 'a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the

business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relating to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.

23. In this regard, the Commission notes that the Hon'ble Supreme Court in the case of *Competition Commission of India Versus Co-Ordination Committee of Artists and Technicians of W.B. Film and Television and Ors (Civil Appeal No. 6691 Of 2014)*, has interpreted the term 'enterprise'. Relevant extracts of the said judgment are as under:

“39. At the outset, it may be noticed that the entities which are roped in, whose agreements can be offending, are enterprise or association of enterprises or person or association of persons or where the agreement is between any person and an enterprise. The expression 'enterprise' may refer to any entity, regardless of its legal status or the way in which it was financed and, therefore, it may include natural as well as legal persons. This statement gets further strengthened as the agreement entered into by a 'person' or 'association of persons' are also included and when it is read with the definition of 'person' mentioned in Section 2(l) of the Act. Likewise, definition of 'agreement' under Section 2(b) is also very widely worded. Not only it is inclusive, as the word 'includes' therein suggests that it is not exhaustive, but also any arrangement or understanding or even action in concert is termed as 'agreement'. It is irrespective of the fact that such arrangement or understanding is formal or informal and the same may be oral as well and it is not necessary that the same is reduced in writing or whether it is intended to be enforceable by legal proceedings or not. Therefore, the Coordination Committee would be covered by the definition of 'person'. However, what is important is that such an 'agreement', referred to in Section 3 of the Act has to relate to an economic activity which is central to the concept of Competition Law. Economic activity, as is generally understood, refers to any activity consisting of offering products in a market regardless of whether the activities are intended to earn a profit. Some examples may be given which would not be covered by Section 3(3) of the Act. An individual acting as a final consumer is not an enterprise or a person envisaged, as he is not carrying on an economic activity. We may also mention that the European Union Competition Law recognises that an entity carrying on an activity that has an exclusively social function and is based on the principle of solidarity is not likely to be treated as carrying on an economic activity so as to qualify the expressions used in Section 3. The reason is obvious. The 'agreement' or 'concerted practice' is the means through which enterprise or association of enterprises or person or association of persons restrict competition. These concepts translate the objective of Competition Law to have economic operators determine their commercial policy independently. Competition Law is aimed at frowning upon the activities of those undertakings (whether natural persons or legal entities) who, while undertaking their economic

activities, indulge in practices which effect the competition adversely or take advantage of their dominant position.

40. The notion of enterprise is a relative one. The functional approach and the corresponding focus on the activity, rather than the form of the entity may result in an entity being considered an enterprise when it engages in some activities, but not when it engages in others. The relativity of the concept is most evident when considering activities carried out by non-profit-making organisations or public bodies. These entities may at times operate in their charitable or public capacity but may be considered as undertakings when they engage in commercial activities. The economic nature of an activity is often apparent when the entities offer goods and services in the marketplace and when the activity could, potentially, yield profits. Thus, any entity, regardless of its form, constitutes an 'enterprise' within the meaning of Section 3 of the Act when it engages in economic activity. An economic activity includes any activity, whether or not profit making that involves economic trade."

24. As per the definition, an enterprise means a person or department of government which is engaged in any activity relating to production, storage, supply, distribution, acquisition or control of any article or goods, or provision of services.

25. The Commission notes that the 'activity' in question necessarily needs to be an economic activity. The question in the present case therefore arises whether DOE, is engaged in an economic activity to be regarded as an enterprise under the provisions of Section 2(h) of the Act while issuing the impugned circulars.

26. As per the website of Ministry of Finance, the Commission notes that DOE performs the following functions:

"The Department of Expenditure is the nodal Department for overseeing the public financial management system in the Central Government and matters connected with state finances. It is responsible for the implementation of the recommendations of the Finance Commission and Central Pay Commission, monitoring of audit comments/ observations, preparation of Central Government Accounts. It further assists central Ministries/ Departments in controlling the costs and prices of public services, reviewing system and procedure to optimize outputs and outcomes of public expenditure. The principal activities of the Department include overseeing the expenditure management in the central Ministries/ Departments through the interface with the Financial Advisers and the administration of the Financial Rules/ Regulations/ Orders, pre-sanction appraisal of major schemes/ projects, handling bulk of the central budgetary resources transferred to State.

The business allocated to the Department of Expenditure is carried out through its Personnel & Establishment Division, Public Finance (States) and Public Finance (Central) Divisions, Office of Controller General of Accounts, Office of Chief Adviser Cost, and Central Pension Accounting Office."

27. Upon perusal of the activities performed by DOE, it appears that DOE oversees the public financial management system in the Central Government and matters connected with state finances and is responsible for the implementation of the recommendations of the Finance Commission and Central Pay Commission. The Commission observes that DOE's principal activities appear to be in realm of policy making and interface with various ministries and not commercial in nature. Accordingly, DOE cannot be regarded as an 'enterprise' in terms of Section 2(h) of the Act especially in relation to circulars which are impugned, which is nothing but manifestation of a government policy in relation to its availing of particular services as a consumer.
28. The second issue is whether the purported agreement executed between DOE, Balmer Lawrie and Ashok Travels is in contravention of provisions of Section 3(4) of the Act read with Section 3(1) of the Act. The Commission notes that TAAI has alleged that by choosing not to deal with the private players, DOE has indulged in refusal to deal under Section 3(4) read with Section 3(1) of the Act. In this regard, the Commission notes that there does not seem to be any vertical relationship between DOE and Balmer Lawrie and Ashok Travels as DOE does not fall at any level of production chain in a market. In view of above, the Commission is of the view that as there is no vertical agreement between DOE, Balmer Lawrie and Ashok Travels under Section 3(4) of the Act and no case of contravention of provisions of the Act is made out under Section 3(4) of the Act.
29. The last issue is whether the purported agreement executed between DOE, Balmer Lawrie and Ashok Travels is covered under Section 3(1) of the Act. In this regard, the Commission observes that Office Memorandums and subsequent circulars are not in the nature of agreement pertaining to an economic activity as discussed above but are internal administrative decision of the Government to deal with a particular agency in the matter of securing air tickets. Such policy decisions of the Government emanating through circulars cannot be termed as an agreement under Section 2(b) of the Act and consequently not the kind of agreement envisaged under Section 3(1) of the Act. Accordingly, the Commission is of the view that no case of contravention of provisions of Section 3(1) of the Act is made out against the DOE, Balmer Lawrie and Ashok Travels.

30. In view of the foregoing, the Commission is of the opinion that there exists no *prima facie* case, and the information filed is closed forthwith against the Opposite Parties under Section 26(2) of the Act.

31. The Secretary is directed to communicate to the parties, accordingly.

Sd/-
(Ashok Kumar Gupta)
Chairperson

Sd/-
(Sangeeta Verma)
Member

Sd/-
(Bhagwant Singh Bishnoi)
Member

New Delhi

Date: 08.05.2020