

COMPETITION COMMISSION OF INDIA

(Case No: 21/2012)

18/9/2012

Advertising Agencies Guild

Informant

Directorate of Advertising and Visual Publicity

Opposite Party 1

Ministry of Information & Broadcasting

Opposite Party 2

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

As per Prasad (Dissenting)

The present information has been filed by the Advertising Agencies Guild, under Section 19 (1) (a) of the Competition Act, 2002 (the Act) alleging that the Opposite Parties has violated the provisions of Section 3 & 4 of the Act.

2. Informant is an association of small and medium sized advertising agencies in the private sector. The members of the Informant association i.e. small and medium sized advertising agencies are covered by Small and Medium Enterprises Development Act 2006. Directorate of Advertising and Visual Publicity (OP1) is the nodal agency under MoIB and has been created to undertake advertising and publicity for various Ministries and Departments of Government of India.

3. According to informant, DAVP is a commercial/economic venture and engaged in the activity of providing advertising services to the government and that the said activity of providing services is a "service" as defined under Sec 2(u) of the Act. Acting as an advertisement agency, the DAVP is a direct competitor of other advertising agencies, including those that are represented by the Informant herein.

4. The informant has alleged that DAVP is the largest buyer of advertisement space in the market across several formats and thus, enjoys a dominant position in the market. It has further been alleged that DAVP does not have the capability and resources to provide the quality services. As per informant, DAVP provides cheaper services by offering 15% agency commission to the customers in the form of a



discount. As per the industry practice, the newspaper and magazines offer advertising agencies a 15% commission on the advertising booked by the agencies. This is only source of revenue for the advertising agencies and advertisement agencies (accredited with INS - Indian Newspaper Society) are not allowed to pass on the agency commission they receive from the publications. Offering of commission in the form of discount by DAVP, according to Informant is abuse of dominant position by following discriminatory and predatory pricing by DAVP.

5. The Informant has alleged that the Opposite Party No.1 enjoys a dominant position because of a circular issued by Opposite Party No.2 in the form of 'advertisement policy' which mandates that All Central Govt. Ministries/Departments/Attached & Subordinate Offices/ Field Offices shall route their advertisement, including display advertisements, through DAVP. According to informant the said 'advertisement policy' is an anti-competitive agreement and violation of the provisions of the Section 3 of the Act. It has further been alleged that the said Clause also attempts to limit the supply of advertisement services to the customers. The customers namely, all Government Ministries/Departments/Attached & Subordinate Offices/Field Offices Government, are denied competitive services that are available in the market.

Analysis

6. After carefully considering the entire material on record i.e. the information and the response to the information from the Opposite Parties, I am of the view that there exist an anti-competitive situation arising as a result of the present policy and conduct of the Opposite Parties and there is a need to bring in more competition in the area involved. Since this involves public money, the enhanced competition will definitely serve to save the money.

The issues to be dealt in the case are following-

- 1) Whether Opposite Parties are an enterprise as per Competition Act, 2002?
- 2) Delineation of Relevant market?
- 3) Whether Opposite Parties are dominant? If yes, what are the factors contributing to the dominance.
- 4) Are there any abuse of dominant position by the opposite parties?

7. Enterprise: As the entities involved are Government agencies, it is to be seen whether they fall under the definition of Enterprise under the Competition Act, 2002. The Enterprise as per Section 2(h) of the Act means 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 sovereign functions of the Government including all activities carried by the departments of the Central Government dealing with the atomic energy, currency, defense and space. Unless the Opposite Parties' activities as per the definition of Enterprise in Act can be classified as "relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defense & space", till that time they cannot avoid being classified as an 'enterprise' under Section 2(h) of the Act. Though DAVP is a government department it is performing the same functions as are carried upon by the private advertising agencies.

8. The definition of 'Enterprise' mentioned above explicitly includes a department of the Government. So if a Government department is found to be abusing its dominant position or is a part of any anti-competitive agreement, it is very well covered under the Act and is liable to penalty. So by including the Government department within the definition the intention of the law maker is absolutely clear which is elimination and prevention of anti-competitive practices and to establish a market which can be termed as competitive even if the doer is a Government Department.

9. The next point to deal is whether Opposite Parties have been engaged in an activity as per Act. The word 'activity' has not been defined in an exhaustive fashion i.e. bounded by some contours rather is an inclusive definition and thus covers any activity. There is no denial to the fact that Opposite parties are engaged in activity of advertising and policy making function. Opposite party no. 1 is operating as an advertising agency on behalf of all the Government agencies. This function has been entrusted to Opposite Party No. 1 vide 'Advertising policy' of the Opposite Party No. 2. As the activity has been defined in the Act in the broadest terms possible and an inclusive definition not an exhaustive one, both the activities carried out by the Opposite parties can be covered under the Act. Keeping the definition not an exhaustive one, the intention of the lawmaker is absolutely clear and to fulfill the



prime objective of the Competition Act i.e. to eliminate anti-competitive practices from India.

10. The issue to be dealt with now pertains to whether the Opposite parties are engaged in an activity relatable to sovereign function of the Government. In this regard emphasis should be on the fact that the central Government has yet not, by notification, exempted the Opposite Parties / activities under section 54 of the Act. This clearly shows that so far Central Government does not consider any of the activities of the petitioner as relatable to sovereign functions.

11. The next issue to be dealt with is the delineation of the relevant market.

Relevant Market: Relevant market after considering the various factors mentioned in 19(6) and 19(7) of the Act may be delineated as "Market for advertising services offered to the Government Departments for Print media – Newspaper". Also relevant market cannot be any other than as mentioned above since it is the policy of government which makes it mandatory for government departments to use the services of DAVP only. Moreover, the rate structure committee constituted by the Government of India, Ministry of Information & Broadcasting, to carry out a comprehensive review of existing Rate Structure for DAVP Advertisements mentioned that "Newspapers should also appreciate the fact that Government advertisement is a separate category". Thus the relevant market is none other than the market for advertising services offered to the Government Departments for Print media – Newspaper in India".

12. Dominance: DAVP is the multi-media advertising agency of the Government of India. The selection of newspapers / journals that will receive government advertising is made by DAVP. It empanels newspapers based on the guidelines laid out in the Policy of the Government of India and negotiates contract rate advertisements - with them on behalf of the government. The ministries and other government departments are entitled to advertise through other agencies not affiliated with the DAVP. However, these agencies need to offer rates similar to the ones that DAVP does. However, in most cases, that is not possible since the DAVP can bargain for the most competitive rates.

13. According to the policy of the Govt. the government departments have to exclusively take the services of the DAVP as it is the nodal agency. Moreover, according to the Annual Report of the Press Council of India, "in print media (for



medium and small newspapers) advertisements placed by DAVP are the only source of revenue to them". It reflects the dominant position of DAVP in the relevant market.

14. Abuse: The abuses mentioned by the informant are related to (i) Policy which makes it mandatory for the government departments to use the services of the DAVP (ii) Passing of the discount received by DAVP to the departments seeking advertisement through DAVP.

15. Regarding the abuse no. (i) mentioned above, the policy of the government has the effect of producing non-level playing field in the relevant market. This non-level playing field denies the other advertising agencies access to the relevant market. Moreover, the condition on the Government departments that in case they resort to private advertising agencies, the final negotiated rate should not be more than the DAVP rates coupled with the DAVP's passing on 15% discount to the advertising departments aggravates the issue of non-level playing field.

16. According to Press Council of India, alone DAVP accounts for about 80%-100% share of income of some category of newspaper; it gives an idea that a major portion of market is out of reach of the private advertising agencies.

17. On the second anti-competitive aspect, discount offered by DAVP to Govt. department is unfair. DAVP being totally dependent on the Government funding is able to pass on the discount to the advertising department. The private agencies on the other hand being run on commercial principles are unable to pass on similar benefit to the advertising departments. This discount is the only income for the private advertising agencies and out of this income only they have to meet all their expenditures. This way it is extremely difficult for the private advertising agencies to match the DAVP rates.

18. Since the funding of the entire operations of the DAVP are done by the Government, the efficiency or inefficiency of the DAVP in performing operations w.r.t. time in handling the advertisement or money involved are all left hidden and unknown. Bringing competition is the mainstay for bringing in efficiency. This lack of competition breeds inefficiency and introduction of competition and level-playing field will challenge the functioning pattern of the DAVP and uproot the inefficiencies. This ultimately has the effect on the saving of the public money. Press Council of India



has mentioned in its Annual Report 2008-09, that there were several complaints lodged by newspapers against DAVP with it.

19. From the above, there is no doubt that the stated advertisement policy has stifled the competition in the relevant market. This coupled with the passing of discount has made the relevant market totally uncompetitive. I am of the opinion that there exists a prima facie violation of the provisions of the Competition Act, 2002 and the DG shall be directed to cause an investigation into the matter and submit a report to the Commission.

20. Secretary is directed to send a copy of the order and all the relevant material to DG.

Certified True Copy



RAMESH CHAND
Asstt. Director
Competition Commission of India
Government of India
New Delhi

(R. Prasad)
Member

25/9/12