



**COMPETITION COMMISSION OF INDIA**

**Case No. 39 of 2013**

**In Re:**

**Shri Shubham Srivastava**

**Informant**

**And**

**Department of Industrial Policy and Promotion**

**Opposite Party**

**Per M. L. Tayal, Member (Supplementary)**

I have had the advantage of reading the draft order prepared by my learned brethren. I am in overall agreement with the conclusions drawn therein that there does not exist a *prima facie* case for directing the Director General (DG) to conduct an investigation into the matter and accordingly, the proceedings relating to this matter deserve to be closed forthwith under section 26(2) of the Competition Act, 2002 ('the Act').

2. However, with regard to the observations of the Commission on the interpretation of the term *enterprise* as given under section 2(h) of the Act as also the scope and extent of intervention by the Commission in policy matters, I wish to add few words of my own.

3. As the facts have been set out in detail in the order proposed by my learned brethren, I need not repeat the same in any greater detail in this order save and except the facts which I deem necessary to elaborate for the present purposes.



4. The issue projected in the information requires interpretation of the term enterprise as given under section 2(h) of the Act.

5. The Indian competition law like any other competition law basically seeks to take care of the supply side of the market to ensure free and fair competition among firms at the market place so that firms may compete with each other and offer their products and services in market without limiting the supplies of goods and services or fixing prices. It is foreseen that competition among the firms would ultimately benefit the consumers since as a result of that better products would be available at competitive prices. This would also increase the efficiencies of firms and incentivize them to innovate. It is considered that competition results in total welfare encompassing both consumers' as well as producers' welfare. However, what is looked into is the behavior of the firms at the market place so that market is not distorted in the interest of a few firms acting either in collusion or in favour of a dominant enterprise or group.

6. It also seeks to promote and protect competitive forces in the market. Competition at a market place essentially means that individuals and firms strive for a greater share of market of goods or services and earn higher profits as a consequence. Competition laws essentially look into the structure, conduct and performance of economic firms at a market place, in other words activities of a business or commercial nature. Therefore, conduct of any non-market entity whose basic activity is not of economic nature, cannot be examined as conduct of a market or economic enterprise. It is futile to try to examine through competition lens the conduct of entities on which even the most elemental concepts of microeconomics and theory of firms like average cost, marginal cost, diminishing returns, production possibility frontier or producers' surplus do not apply. The definition of enterprise in section 2(h) must be seen in light of this basic logic that applies to firms in economic theory.



7. At this stage, it would be pertinent to have a look at the definition of enterprise as given in section 2(h) of the Act. The same is quoted below:

*Section 2(h): "enterprise" 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 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.*

*Explanation.—For the purposes of this clause, -*

*(a) "activity" includes profession or occupation;*

*(b) "article" includes a new article and "service" includes a new service;*

*(c) "unit" or "division", in relation to an enterprise, includes-*

*(i) a plant or factory established for the production, storage, supply, distribution, acquisition or control of any article or goods;*

*(ii) any branch or office established for the provision of any service;*

8. As may be noted, in order that any entity falls within the meaning of enterprise as per section 2(h) of the Act, it is necessary that it is or has been 'engaged in any activity' of the nature defined therein. The activities mentioned in the said section are clearly economic and commercial in nature. Furthermore, the words 'engaged in' preceding the words 'any activity' reflect both regularity and continuity of the activities mentioned in the section.



9. The present information has been filed under section 19(1)(a) of the Act by Shri Shubham Srivastava ('the informant') against the Department of Industrial Policy and Promotion ('the opposite party/ DIPP') alleging *inter alia* contravention of the provisions of sections 3 and 4 of the Act.

10. A pertinent question is whether DIPP in the instant case is engaged in any of the activities mentioned in section 2(h).

11. On a careful perusal of the information, it appears that the informant is aggrieved by the decision of DIPP in revising FDI Policy in Air Transport Services *vide* its revisions in Press Note No.6 (2012 Series) of September 20, 2012 whereby it decided to permit foreign airlines to invest, in the capital of Indian companies, operating scheduled and non-scheduled air transport services up to the limit of 49% of their paid-up capital. The informant is dissatisfied with the fact that the said revisions were made not applicable to Air India.

12. It may be noted that the role and functions of DIPP primarily include:

(i) Formulation and implementation of industrial policy and strategies for industrial development in conformity with the development needs and national objectives;

(ii) Monitoring the industrial growth, in general, and performance of industries specifically assigned to it, in particular, including advice on all industrial and technical matters;

(iii) Formulation of Foreign Direct Investment (FDI) Policy and promotion, approval and facilitation of FDI;

(iv) Encouragement to foreign technology collaborations at enterprise level and formulating policy parameters for the same;



(v) Formulation of policies relating to Intellectual Property Rights in the fields of Patents, Trademarks, Industrial Designs and Geographical Indications of Goods and administration of regulations, rules made there under ;

(vi) Administration of Industries (Development & Regulation) Act, 1951

(vii) Promoting industrial development of industrially backward areas and the North Eastern Region including International Co-operation for industrial partnerships and

(viii) Promotion of productivity, quality and technical cooperation.

13. A bare perusal of the role and functions of DIPP as noted above would indicate that the same are in the realm of policy formulation and monitoring of such policies. By no stretch of logic, such functions can be said to fall within the meaning of the term *enterprise* which would require an entity to engage in economic and commercial activities. Furthermore, an entity while formulating policies cannot be said to operate in some market with inherent desire to acquire more market power or earn higher profits.

14. Looking at the alleged activity of DIPP, it becomes apparent that it cannot be said to be engaged in an activity relating to the production, storage, supply, distribution or acquisition or control of any article or goods nor it can be said to be providing any service related to air transport. The activities specified in the definitional clause when read with the Explanation of that clause clearly indicate correlation of the activity with an avenue of earning or profit in a market. The contention of the Informant that DIPP is enjoying a monopoly in the market of 'formulation, promotion, approval and facilitation of FDI policy in civil air transport services in India' is, to say the least, specious. First of all it needs to be understood that can there possibly be any *market* for formulation of policy, a function which falls in the exclusive domain of a political executive. Such functions cannot be discharged by any private entity and are inherently embedded in the sovereignty of a state. This premise becomes clear



in the light of the fact that DIPP has been clothed with the power of framing such policies through the Government of India (Allocation of Business) Rules, 1961 framed in exercise of powers conferred on the President under Article 77(3) of the Constitution. Secondly, even assuming for the sake of argument that the DIPP can be covered under the term 'enterprise' as defined in section 2 (h) of the Act by taking the interpretation that the policy decisions of the DIPP amount to 'control of provision of services in the relevant market' the next step the Commission would be required to take is to define the 'relevant market' and examine the dominance of DIPP in terms of the provisions of the Act. This is so because merely terming DIPP as an enterprise is not an end in itself and in order to take the matter to logical conclusion other relevant provisions are required to be applied to examine the alleged violation of section 4 of the Act. The provisions relevant for defining the 'relevant market' are given in clauses (r), (s) and (t) of section 2 and sub-sections (5), (6) and (7) of section 19 the Act. Similarly, the dominance of an enterprise is to be assessed in terms of provisions contained in Explanation to section 4 and section 19(4) of the Act. It will be shown in subsequent paras of this order that even if any Government Department which seemingly is not engaged in any commercial activity, is thought to be covered under the definition of 'enterprise' it will not serve any useful purpose if the rest of the provisions of the Act are later found to be inapplicable to such non market activity.

15. Now, in order to determine the relevant market the application of relevant provisions to the facts of this case may be examined. Section 2 (r) and 19(5) of the Act provide that the relevant market may be determined with reference to 'relevant product market' and/or 'relevant geographic market'. The definition of 'relevant product market' is provided in section 2(t) which runs as under:

“relevant product market” means a market comprising of all those products and services which are regarded as interchangeable or substitutable by the consumer, by reasons of characteristics of the products or services, their prices and intended use.”



Further, section 19(7) of the Act provides as under:

“The Commission shall, while determining the “relevant product market” have due regard to all or any of the following factors, namely:-

- (a) physical characteristics or end-use of goods;
- (b) price of goods or service;
- (c) consumer preferences;
- (d) exclusion of in-house production;
- (e) existence of specialized producers;
- (f) classification of industrial products.”

16. Since in the assumption, as referred above, the policy framing activity of DIPP has been taken as amounting to ‘control of provision of services in relation to air transport sector’ the relevant product could be taken as policies/rules of government departments or public authorities which also amount to similar control. In this market the possible enterprises, apart from DIPP, could be the DGCA and/or Ministry of Civil Aviation as the DGCA grants NOC to any person who seeks to operate scheduled air transport service and Ministry of Civil Aviation gives permission to the operator to acquire/purchase aircrafts in terms of Aircraft Rules, 1937. Applying the same logic the DGCA and Ministry of Civil Aviation can also be said to be controlling the provision of service related to civil air transport. The next question arises whether the laying down of policies or regulations/circulars will be covered in the definition of goods or service. In my opinion this kind of activity can hardly be said to be covered either under the definition of goods or service as provided in the Act. In the case of any activity not falling within the definition of either goods or service, no market definition can possibly be constructed where relevant provisions of the Act can meaningfully be applied to delineate relevant market and assess dominance of such enterprise.

17. The conclusion drawn above further gets reinforced when provisions related to determination of relevant product market, as quoted above, are



sought to be applied to the impugned activity of DIPP or activities of other Government department apparently having similar kind of effect. Even if we further assume that DIPP is providing some kind of service it will not resolve the logjam. Next question which springs before us is who are the consumers of this service and is there any demand for this kind of service and whether principles of demand and supply can be applied to such service. Further, what are the services which can be regarded interchangeable by the consumers considering their characteristics, prices and intended use. Do the consumers have any preference for the service provided by the DIPP. In my humble opinion none of these tests can be gainfully applied to the impugned activity of DIPP. Similar result would emerge when the provisions relating to assessment of dominance are sought to be applied to the activities of DIPP. Therefore, merely dubbing DIPP as enterprise without taking a holistic view of the purpose and spirit of the Act will not serve any useful purpose.

18. With the aforesaid observations and clarification, I record my concurrence with the final conclusion reached in the order proposed by my brethren.

**Sd/-**  
**(M. L. Tayal)**  
**Member**

New Delhi

Date: 08/10/2013