



Case No. 39 of 2013

In re:

Sh. Shubham Srivastava,

...Informant

C-40, Flat Sidbi Apartments, Inderpuri, New Delhi-110012

And

Department of Industrial Policy & Promotion (DIPP)

...Opposite Party

Ministry of Commerce & Industry, Udyog Bhawan, New Delhi

CORAM:

Mr. Ashok Chawla

Chairperson

Dr. Geeta Gouri

Member

Mr. Anurag Goel

Member

Mr. M. L. Tayal

Member

Mr. Justice (retd.) S. N. Dhingra

Member

Mr. S.L.Bunker

Member

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

Informant, a citizen of India, challenged the conduct of DIPP in revising Press Note No.6 (2012 Series), modifying foreign direct investment policy in the civil aviation sector in a manner allegedly inconsistent with the scheme, intent and object of the Competition Act, 2002 ('the Act').

2. As per the information, DIPP was responsible for formulation, promotion, approval and facilitation of Foreign Direct Investment (FDI) policy. DIPP was also responsible for facilitating and increasing the FDI inflow in the country. Foreign Investment Promotion Board (FIPB), located in Department of Economic Affairs, Ministry of Finance, provided a framework



of FDI regime for approval of FDI investment proposals. DIPP is alleged to be an 'enterprise' within the meaning of section 2(h) of the Competition Act.

3. It is alleged that DIPP, by virtue of its role in formulation, promotion, approval and facilitation of FDI in India, enjoyed a monopoly under the statutes, rules and regulations. Relevant market proposed by the Informant was 'formulation, promotion, approval and facilitation of Foreign Direct Investment policy in civil air transport services in India.' Being entrusted with the significant role, DIPP is stated to be in a dominant position in the proposed relevant market.

4. The Informant submitted that airlines were allowed to participate in the equity of companies operating cargo airlines, helicopter and sea plane services, but not in the equity of an air transport undertaking operation scheduled and non-scheduled air transport services. Under the then prevalent policy of the Government of India through 49% FDI (100% for NRIs) through automatic route was permitted in Scheduled Air Transport Service/Domestic Scheduled Passenger Airlines, no foreign airline was allowed to participate directly or indirectly in the equity of an Air Transport Undertaking engaged in Scheduled and Non-Scheduled Air Transport Services except Cargo airlines. The same policy was uniformly applicable for all the airlines (including Air India). However, without any rationale or cogent reasons or change in circumstances, DIPP vide its revisions in Press Note No. 6 (2012 Series) of September 20, 2012 decided to permit foreign airlines also to invest in the capital of Indian companies, engaged in scheduled and non-scheduled air transport services up to a limit of 49% of their paid-up capital. However, the above FDI policy was not made applicable to Air India.

5. The move of FDI in the airlines of India was to open up financing options available for airlines in the country, for their operations and service up gradation, and to enable them to compete with other global carriers. The informant contended that the proposed exclusion of Air India from the



changes in FDI architecture for Civil Aviation sector would result in reverse discrimination against Air India at the cost of taxpayers.

6. The informant further stated that the revised position with respect to FDI in the sector will result in reverse discrimination against Air India and will consequentially force the Government of India to use public money for recapitalization/preferential treatment for it. It was submitted that had the Government of India formulated the policy framework in a competitive neutral manner, the need for such distorted preferential treatment/bailouts for Air India could have been obviated and it could have financed its capital requirements through the options as available to other private airlines. Such architecture was alleged to be distorting the competitive neutrality in the aviation sector.

7. The information alleged that the by formulating the policy in a discriminatory manner, the Government of India foreclosed and pre-empted all such foreign investment opportunities in Air India. This has, as per the information, resulted in contravention of sections 4(2)(a)(i), 4(2)(b)(i) and 4(2)(c) of the Act. The Informant prayed to the Commission to direct an investigation into the alleged discrimination made by DIPP.

8. The Commission has perused the facts and heard the informant. The term 'enterprise' as defined in 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 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, defence and space.

9. It may be noted that the policy pronouncements made by DIPP on FDI through Press Notes/ Press Releases were notified by the Reserve Bank of India as amendments to the Foreign Exchange Management (Transfer or Issue of Security by Persons Resident Outside India) Regulations, 2000. The policy pronouncement on FDI through Press Notes/ Press Releases by OP *prima facie* amounts to control of provision of services in the relevant market. A department of the government can be classified as an enterprise if the functions discharged by it amounts to ‘control of articles or goods, or the provision of services’. The Commission in its order dated 30.11.2011 in the case of *Shri Debapriyo Bhattacharya v. The principle Secretary & Anr.*, Case No. 54 of 2011 held that the Secretary (of the Home Department) to Andhra Pradesh was covered within the definition of ‘enterprise’ on the following reasoning:

... the Secretary to the State Government issued notification in respect of grant of license for e-ticketing. Licensing amounts to control over the provision of service and, therefore, any act of the Secretary or the State Government which relates to control of services was covered under the purview of the Competition Commission. Undoubtedly, issuing the licences for providing cinema tickets to a party is not a sovereign function of the State and it is a function being exercised in control of services...

10. Therefore, *prima facie* OP appears to be an enterprise as defined under section 2(h) of the Act.

11. However, as per the Government of India (Allocation of Business) Rules, 1961 framed by the President of India, in exercise of powers conferred on the President under Article 77(3) of the Constitution, DIPP is constitutionally empowered to frame such executive policy on FDI. Thus, the DIPP is empowered to make policy pronouncements on FDI. The revised



Press Note No. 6 (2012 Series) of September 20, 2012 decided to permit foreign airlines to invest in the capital of Indian companies, engaged in scheduled and non-scheduled air transport services up to a limit of 49% of their paid-up capital, in exclusion of Air India. This revision only gave an additional option to all private airlines to finance their capital needs through foreign direct investments from foreign airlines, which does not affect their interest inter-se. Moreover, the same may promote competition in the relevant market by facilitating cash crunch airlines to avail FDI for their operations, growth and expansion. Not allowing FDI from foreign airlines in Air India does not appear to be hampering competition in the relevant market in any way. As such, this action does not prima facie seem to create any appreciable adverse effect on competition in markets in India.

12. In view of the foregoing discussion, the Commission is of the opinion that it is not a fit case for causing investigation to be made by the DG under section 26(1) of the Act. The case deserves to be closed under section 26 (2) of the Act and is accordingly hereby closed.

13. The Secretary is directed to communicate the decision of the Commission to all concerned accordingly.

New Delhi

Dated: 08/10/2013

Sd/-
(Ashok Chawla)
Chairperson

Sd/-
(Dr. Geeta Gouri)
Member

Sd/-
(Anurag Goel)
Member

Sd/-
(S. N. Dhingra)
Member

Sd/-
(S.L.Bunker)
Member