



COMPETITION COMMISSION OF INDIA

Case No. 70/2014

DISSENT NOTE

PER

AUGUSTINE PETER, MEMBER

1. The Majority of the Members of the Commission are of the view that the activities being performed by OP1 cannot be covered in the definition of ‘enterprise’, as it is “not directly engaged in any economic and commercial activities”. The Majority decision views the role of OP1 as limited to being a State Government Department providing public infrastructure facilities to the people without any commercial consideration. They have, therefore, concluded that the PWD of Haryana is not an enterprise under section 2(h) of the Competition Act, 2002. Therefore, they have not gone into the issue of dominance or its abuse by the OP1.
- 2 I do not agree with the findings in the Majority decision as regards the status of OP1 as not being ‘enterprise’ under section 2(h).
- 3 The Commission has been set up with the mandate:

“.. to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto”.
- 4 The Commission’s mandate is to ensure compliance of provisions, *inter alia*, of Sections 3 and 4 of the Act. Moreover, Section 62 provides that the provisions of the Act are in addition to, and not in derogation of, the provisions of any other law for the time being in force.
- 5 Section 2(h) of the Competition Act defines ‘Enterprise’ as follows:



“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 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.(Emphasis added)

6 Accordingly, a threefold criteria to test whether the requirements under Section 2(h) to qualify to be treated as an enterprise are satisfied are:

- (i) Whether it is a person (as defined in the Act in section 2(l) or Department of Government, whether State or central Government;
- (ii) Whether it is 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
- (iii) If it is a Government Department whether the activity under consideration is non relatable to the sovereign functions of the Government

7 As for the *first criterion*, it is no one’s point that the Public Works Department of the State of Haryana, OP1, is not a Government Department.

8 The *second issue* is if OP1 is engaged in any activity specified in section 2(h). The activities specified in section 2(h) are those 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. Obviously the activities specified in section 2(h) are economic activities.

- 9 The issue of whether an activity is economic activity as defined in section 2(h) of the Act was analysed in a Supplementary Order in case No. 19 of 2011 dated 30th September, 2011 by one of the Members of the Commission. Drawing on certain decisions of the European Union Competition Authority it was concluded therein that:

“It is noted that a mature competition law jurisdiction clearly relates activity to ‘economic’ activity. For an activity to be considered ‘economic’ the entity must be operating in some market, where there are buyers and sellers. Purchase by any entity in itself cannot render an entity as ‘undertaking’ if subsequent use of such purchase is not an economic activity” (para 18)

- 10 Let us apply this test to the ‘activity’ which is under consideration in the instant case. *First*, the activity is ‘procurement of services for construction of roads and bridges by tendering’. The procuring entity is PWD of Haryana, the OP1. It is operating in the market for procurement of services for construction of roads and bridges through tendering. Approach road to a Rail Over Bridge (RoB) presumes that a RoB has been constructed or is being constructed to which it would give access. Here there is a ‘procurer of service’ and there are number of ‘suppliers of service’, the Informant being one of them. The *Second* issue is whether subsequent use of such purchase is an economic activity. In the instant case the activity being procurement of services for construction of approach roads the output is approach roads, which serve as an infrastructure providing access to Rail Over Bridge (ROB). Vehicles and passengers passing that way need not wait for the train to pass once the ROB is ready and is open for access. It does not matter whether any toll is collected or not. In case toll is collected it may become a commercial activity. If not it would be an economic activity providing benefits to the users of the approach road. It results in economic benefits. It may not be a commercial activity in the sense that it results in profit to the PWD, the OP1 or to the



Government of Haryana directly. Here we need to differentiate between ‘economic’ viability and ‘commercial’ viability’ of a project or activity. The activity/project for which tender is floated may not be commercially viable. But once we take into account the saving in time of passengers, saving in inventory cost of assets waiting at the rail crossing in commercial vehicles, reduction in pollution from waiting vehicles etc., substantial benefits accrue to the economy, though the financial benefits accruing to the PWD, the OP1 may not be substantial unless it is a toll RoB. In most states and at the Central Government level road and bridge projects are undertaken after assessing economic costs and benefits.

- 11 Coming to the **third criterion** as to whether the Government Department’s activity is relatable to sovereign function, what para 2(h) indicates clearly is that a Government Department is not to be treated as doing exclusively activities relatable to sovereign functions only, the four departments of atomic energy, currency, defence and space being the only exemption. Government Departments could be engaged in activities relatable to sovereign functions and/or activities non relatable to sovereign functions.
- 12 There is no doubt that OP1 is a Department of the Government of the State of Haryana, entrusted with the responsibility of planning and implementing public works like construction and maintenance of roads and bridges in the State of Haryana. These activities the Department can do on its own or delegate to other persons. In the instant case bid was invited by the Department for implementing a project for “*Construction of Approaches to 2 Lane ROB at Level X-ing No 78-AB in KM 139 on Delhi Ambala Railway line crossing Nilokheri-Karsa-Dhand road in Karnal District.*”
- 13 The majority decision speaks of ‘economic and commercial’ activities. Economic activity need not be relatable to profit objective, while commercial activities have as their objective profitability. The Act in section 2(h) refers to activity in the sense of economic activity and not commercial activity.



- 14 The mandate of OP1 is to plan and implement public works like construction and maintenance of roads and bridges which it normally does by calling tenders, which on being accepted, fructify into legally enforceable contracts. Whether the activity of procuring construction services is with a view to making profits is not a concern for the Act. What is important is that the Public Works Department, OP1, by floating tenders, is interfacing with a wide market for road and bridge construction services in the state of Haryana, and its interface with the providers of construction services has the potential of affecting and distorting the market.
- 15 Unless the aforesaid activity of OP1 can be classified as “relatable to the sovereign functions of the government, including all activities carried on by the Department of Central Government dealing with atomic energy, currency, defence and space”, it cannot escape being classified as an ‘enterprise’ under section 2(h) of the Act. If it is an ‘enterprise’ under the aforesaid section, the Commission gets jurisdiction under chapter IV of the Act.
- 16 What is important and relevant is to see if the activities of OP1, which are alleged to be in violation of section 4 of the Act are covered as “relatable to sovereign function of the Government”. In this context it is relevant to discuss the decisions of the various Courts, including the Apex Court on the issue of ‘sovereign functions’.
- 17 In the Landmark case of *Bangalore Water Supply & Sewage Board v A. Rajappa* (1978) 2SCC 213, a seven judge Bench of the Supreme Court while interpreting the term ‘Industry’ as defined in Section 2(j) of the Industrial Disputes Act 1947 exempted only sovereign functions from the ambit of industrial law. In that case the Apex Court observed:

“There is no justification for excepting the categories of public utility activities undertaken by the Government in the exercise of its inalienable function, under the constitution, call it regal or sovereign or by any other name, from the definition of "industry". If it be true that one must have regard to the nature of



the activity and not to who engages in it, it is beside the point to enquire whether the activity is undertaken by the State, and further, if so, whether it is undertaken in fulfilment of the State's constitutional obligations or in discharge of its constitutional functions. In fact, to concede the benefit of an exception to the State's activities which are in the nature of sovereign functions is really to have regard not so much to the nature of the activity as to the consideration who engages in that activity; for, sovereign functions can only be discharged by the State and not by a private person. If the State's inalienable functions are excepted from the sweep of the definition contained in section 2(j), one shall have it is the nature of the activity is an industry. Indeed, in this respect, it should make no difference whether on the one hand, an activity is undertaken by a corporate body in the discharge of its statutory functions or, on the other, by the State itself in the exercise of its inalienable functions.”

- 18 The Court further held that the sovereign functions, strictly understood, alone qualify for exemption, not the welfare activities or economic adventures undertaken by the government or statutory bodies. **In other words only primary, inescapable, inalienable and non-delegable functions of a government should qualify for exemption within the meaning of ‘sovereign functions’ of the government and welfare, commercial and economic activities are not covered within the meaning of ‘sovereign’ function.**
- 19 In *P.W.D. Employees Union and Ors. v State Of Gujarat And Ors* (1987) 2 GLR 1070 it was observed that the welfare activities or economic adventure undertaken by the Government or statutory bodies do not qualify for being treated as sovereign functions.
- 20 Further, in *N. Nagendra Rao & Co v State of A.P.* (1994) 6SCC 205, the Supreme Court also approached the issue in similar manner and observed:
- “In Welfare State, functions of the State are not only defence of the country or administration of justice or maintaining law and order but it extends to regulating and controlling the activities of people in almost every sphere,*



educational, commercial, social, economic, political and even marital. The demarcating line between sovereign and non-sovereign powers for which no rational basis survives has largely disappeared. Therefore, barring functions such as administration of justice, maintenance of law and order and repression of crime etc. which are among the primary and inalienable functions of a constitutional Government, the State cannot claim any immunity.”

- 21 In *Common Cause v Union of India* (1999) 6SCC 667, the Court quoting *N. Nagendra Rao & Co v State of A.P.* (1994) 6SCC 205 reiterated the view already taken by the Apex Court.
- 22 The above principles were once again reiterated in the case of *Agricultural Produce Market Committee v Ashok Harikunt and Anrs etc.* (MANU/SC/0597/2000) where the Apex Court held as follows:

“In other words, it all depends on the nature of power and the manner of its exercise. What is approved to be Sovereign is defence of the country, raising armed forces, making peace or war, foreign affairs, power to acquire and retain territory. These are non-amenable to the jurisdiction of ordinary civil courts. The other functions of the State including welfare activity of State could not be construed as ‘Sovereign’ exercise of power. Hence, every government function need not be sovereign. State activities are multifarious, from the primary sovereign power, which is exclusively inalienable could be exercised by the Sovereign alone, which is not subject to challenge in any civil court to all the welfare activities, which would be undertaken by any private player...”

“So, sovereign function in the new sense may have very wide ramifications but essentially sovereign functions are primary inalienable functions which only State could exercise. Thus, various functions of the State, may be ramifications of ‘Sovereignty’” but they all cannot be construed as primary inalienable functions. Broadly it is taxation, eminent domain and police power which covers



*its field. It may cover its legislative functions, administration and law, eminent domain, maintenance of law and order, internal and external security, grant of pardon. So, the dichotomy between sovereign and non-sovereign function could be found by finding which of the functions of the State could be undertaken by any private person or body. The one which could be undertaken cannot be sovereign function. In a given case even in subject on which the State has the monopoly may also be non-sovereign in nature. Mere dealing in subject of monopoly of the State would not make any such enterprise sovereign in nature. **Absence of profit making or mere quid pro quo would also not make such enterprise to be outside the ambit of ‘industry’ as also in State of Bombay & Ors case”** (Emphasis added)*

- 23 In a more recent case, which is directly relevant to the issue in hand, *State of UP v. Deep Chandra* (MANU/UP/733/2003), the SC in Para 31 held that:

*“Applying the principles laid down by the Apex Court..... regarding dominant nature test and sovereign functions to the facts of the present case **we find that the construction and repairs of road undertaken by the Public Works Department cannot be said to be a sovereign function. The dominant nature is the construction activity undertaken by a Department of the Government in discharge of its being a welfare State. Thus, the PWD of the Government of Uttar Pradesh is an industry and provisions of the UP Act are applicable to it.**”* (Emphasis added)

- 24 In *Kalus Hofner & Fritz Elser v Macrotron Gmb H* decision dated 23/04/1991, the Court of Justice of European Communities whilst considering the definition of the term ‘undertaking’ under the EEC Competition Law, held that **the concept of an ‘Undertaking’ encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and of the way in which it is financed. It was accordingly held that employment recruitment is such an economic activity, irrespective of whether it is normally entrusted to a public agency. A public**



employment agency operating in the general economic interest remains subject to the EEC competition rules.

- 25 The above decision was also followed in the case titled as *Distribution of Package Tours During the 1990 World Cup* OJ (1992) I 326/31 where the EEC Commission, whilst re affirming the decision in the case of *Walrave v Union Cycliste Internationale Cases 36/74 of 12 December 1974*, held that **any entity carrying of an activity of an economic nature, regardless of its legal form, constitutes an undertaking within the meaning of Article 85 of the EEC Treaty and further stated that an activity of an economic nature means any activity, whether or not profit making, that involves an economic trade.**
- 26 Thus, it is amply clear that all the functions of the State are not relatable to ‘sovereign function’. Sovereign functions are those that are non-delegable, inescapable and inalienable functions of the State. The activities of OP1 under consideration are delegable (and, in fact, it is being delegated through tender), it is escapable, being welfare function, and alienable, as far as sovereignty is concerned. Public works are now being implemented more and more in public private partnership (PPP) mode and are even thrown open to the private sector.
- 27 The Hon’ble High Court of Delhi in *UOI v. CCI*, W.P.(c) 993/2012&CM Nos 2178-7 9/2012 dated 23-02-2012 clarified as follows:

“It is not petitioner’s contention that it is not a Department of Government. It is also not the petitioner’s contention that it is not engaged in an activity relating to provision of services,Therefore, unless the petitioner’s aforesaid activity can be classified as “relatable to sovereign functions of the Government including all activities carried on by the departments of atomic energy, currency, defence and space”, it cannot avoid being classified as an ‘enterprise’ under section 2(h) of the Act. If it is an ‘enterprise’ under section 2(h) of the Act, the Commission gets jurisdiction under Chapter IV of the Act.”



28 The Hon'ble High Court of Delhi in its Order also pointed out that the very fact that the Act provides under section 54 of the Act that the Central Government may, by notification, exempt from the application of this Act or any provision thereof, and for such period as, it may specify it in such notification –

- a)
- b)
- c) “any enterprise which performs sovereign function on behalf of the Central Government or a State Government provided that in case an enterprise is engaged in any activity, including the activity relatable to the sovereign functions of the Government, the Central Government may grant exemption only in respect of activity relatable to the sovereign functions”

29 This indicates that the intent of the Act is very clear and does not leave anyone in doubt. Until date no notification has been issued by the Central Government exempting any Government Department, whether State or Central Government, from the application of Competition Act, 2002.

30 Hon'ble Delhi High Court, in its above-mentioned Order of 23/02/2012 also clarified that:

*An “.....enterprise may perform some sovereign functions while other functions performed by it, and the activities undertaken by it, may not refer to sovereign functions. **The exemption under section 54 could be granted in relation to the activities relatable to sovereign functions of the Government, and not in relation to all the activities of such an enterprise.** (Emphasis added)*

31 The Hon'ble High Court also noted as follows:-



“The petitioner has entered into a concession agreement under its PPP policy. It is, therefore, clear that respondent no.2 is performing a commercial activity and rendering services for a charge, which, prior to the entering into the aforesaid agreement with the petitioner, was being performed by the petitioner.It is, therefore not an inalienable function of the State”.

- 32 In the instant case, the informant, or for that matter any enterprise that participates in the bid floated by OP1, would be performing an economic activity by rendering construction services to OP1 for a price. And such activity is not relatable to sovereign function. OP1, in discharging its functions, can proceed towards the execution of the work on its own or can call for tenders and award the work to the successful bidder. It is not the case of the informant that OP1 performs the work of construction of roads and bridge on its own, but rather it invites tender, processes the bids, scrutinizes the bids, negotiates the rates with the successful bidder and can also cancel the bid if the same does not confirm with its requirements. Such activities connected with the execution of work through inviting bids/ tenders cannot, in any case, be called as a discharge of sovereign function.
- 33 What is evident is that every economic activity by a government department non relatable to sovereign function is covered under competition law. As clearly indicated in judicial pronouncements cited above the Public Works Department, Government of Haryana while engaged in procuring construction services is not engaged in activity relatable to sovereign function. On the other hand, when OP1 is engaged in decisions like how much budget has to be allocated towards public works in general, or to a particular project, which public works to be undertaken, etc., for example, such decisions could be said to belong to the sovereign domain of policy making by the Department. However, when it implements the project through inviting tenders, the Department, in fact, is performing non sovereign related function, and in the process also interfaces with the market and affects the market for construction services. Competition issues are obvious, and PWD is an ‘enterprises’ under section 2 (h) of Competition Act, 2002.



- 34 Competition Act, 2002 is in essence an effect based law. Procurer has no ‘colour’ as far as impact of the act of an enterprise on the market is concerned. What matters is dominance of the enterprise in the relevant market and its ability to operate independently of competitive forces prevailing in the relevant market or affect its competitors or consumers or the relevant market in its favour.
- 35 It may be recalled that the MRTP Act, 1969 originally covered only ‘undertaking’s in the private sector. Public sector ‘undertakings’ were brought under its purview only through the 1991 amendment to that Act. When Government Departments were covered in Competition Act, 2002, it was hailed as a major step forward. The objective was to bring under the purview of the Competition Act all economic activities except the activities carried on by Government Departments in their sovereign capacity, including all the activities of the four Government Departments of space, currency, defence and atomic energy.
- 36 Parliament has enacted Competition Act, 2002 to ensure a level playing field for all market players so as to achieve the objectives enshrined in the Preamble and section 18 of the Act. With the result there is no scope for discrimination as between public sector, private sector or government departments when it comes to their interface with the market and its effects, except as specified in section 2(h) or as exempted as per section 54 of the Act. It needs to be emphasised that this Act is essence is an effects based law.
- 37 Competition is promoted all the world over and competition laws are enacted because of the knowledge, experience and conviction that it brings efficiency in economic activity. Efficiency could be allocative, productive or distributive. Adherence to competition principles results in the best flowing out of an economic activity. Neglect of competition principles result in slide towards inefficiency, high cost, lower quality, scarcity and the like. Applying competition principles in bidding process results in more number of bidders participating and the most competitive becoming available for selection.



- 38 In case competition results in efficiency, it is important that every enterprise, irrespective of ownership or legal status play to the tune of competition principles. The only exemption being sovereign functions. This is all the more relevant in the case of economic activities engaged in by government departments which are handling public money and are under budget constraints. They are accountable for the public money that has been entrusted to them and are duty bound to spend the money allocated in the most efficient way possible. Subjecting Government Departments engaged in economic activity non relatable to sovereign functions to competition law serves the very benign objective of efficient utilisation of public funds
- 39 Thus, I hold OP1 to be an ‘enterprise’ u/s 2(h) of the Act.
- 40 Now that it has been established that OP1 is a government department engaged in a non-sovereign activity, the next step towards forming a *prima facie* opinion is to determine whether OP1 is dominant.
- 41 As per its Annual Administrative Report the Haryana Public Works Department (Building & Roads) is the Principal Department of the State Government for the construction and maintenance of roads, bridges and government buildings in the state of Haryana. As per the Report for the year 2012-13, an expenditure of Rs.2259.33 crores was incurred on various works of roads, bridges and buildings, both in respect of construction and maintenance by the Department. Most of the work is executed through tenders. The details of expenditure are as follows: Construction/improvement of Roads (Rs. 1032.60 crores), Maintenance of Roads (Rs. 468.67 crores), Construction of NH roads (including bridges) (Rs. 78.51 crores), Maintenance of NH Roads (Rs. 16.67 crores) and Construction of bridges (106.02 crores). The remaining expenditure was on construction and maintenance of buildings.
- 42 The relevant market in this case is the ‘market for procurement of construction services through bidding for roads and bridges in the state of Haryana’. In this market, the



Public Works Department (B&R) of Haryana is the dominant player in the geographical market of State of Haryana in the sense that they are responsible for construction of State Highways, Major District Roads and some of the other District Roads, Railway Over-Bridges (ROBs), Railway Under Bridges (RUBs), Bridges, rehabilitation of public bridges, and construction of National Highways in the State of Haryana. Major construction activities relating to public roads and bridges are through tendering and are under the charge of OP1.

- 43 As far as procurement of the construction services for roads and bridges by tender is concerned OP1 has near monopoly in the state of Haryana. And I am of the *prima facie* view that OP1 is a dominant player in the relevant market thus defined.
- 44 Proceeding to the issue of alleged abuse of dominant position by OP1 the allegations by the Informant relates to imposing unfair conditions in procurement of services for '*Construction of Approaches to 2 lane Rail Over Bridge at Level X-ing No 78-AB in KM 139 on Delhi Ambala Railway line crossing Nilokheri-Karsa-Dhand road in Karnal District*'. A close look at the allegations show that the conditions prescribed are *prima facie* unfair and there is a *prima face* case made out. I am, therefore, of the *prima facie* view that there is contravention of section 4(2)(a)(i) of the Act.
- 45 Accordingly I am of the view that under section 26(1) of the Act, the Director General (DG) should be directed to cause an investigation into the matter.

Sd/-
(Augustine Peter)
Member

New Delhi

Date: 12-01-2015