COMPETITION COMMISSION OF INDIA

Case No. 79 of 2012

***In Re*:**

Air Cargo Agents Association of India
28-B, Nariman Bhavan Nariman Point
Mumbai- 400021 **Informant**

And

International Air Transport Association
Route de l' Aeroport 33
PO Box 416
1215 Geneva
Switzerland **Opposite Party No. 1**

International Air Transport Association (India) Pvt. Ltd.
12/13, Esplande, 3rd Floor
AK Nayak Marg, Fort
Mumbai- 400001 **Opposite Party No. 2**

CORAM

Ashok Kumar Gupta
Chairperson

Sangeeta Verma
Member

Bhagwant Singh Bishnoi
Member

Appearances:

For the Informant Mr. Jimmy F. Pochkhanawalla, Senior Advocate with Mr. Manas Kumar Chaudhuri, Advocate along with Mr. Sunil Arora of the Informant.

For the Opposite Party Nos. 1 and 2	Mr. Rajshekhar Rao, Mr. Bharat Budholia, Ms. Aishwarya Gopalakrishnan, Ms. Gayatri Pradhan, Mr. Varun Thakur and Mr. Raghav Kacker, Advocates along with Mr. Amitabh Khosla and Mr. Rodney Augustine D'Cruz of IATA/ IATA India.

Order under Section 26(6) of the Competition Act, 2002

1. The present Information has been filed by Air Cargo Agents Association of India (hereinafter, the 'Informant'/ 'ACAAI') on 21.12.2012 under Section 19(1)(a) of the Competition Act, 2002 (hereinafter, the 'Act') against International Air Transport Association (hereinafter, the 'Opposite Party No. 1'/ 'OP-1'/ 'IATA') and International Air Transport Association (India) Pvt. Ltd. (hereinafter, the 'Opposite Party No. 2'/ 'OP-2'/ 'IATA India') [collectively referred to as 'the Opposite Parties'/ 'OPs'] alleging, *inter alia*, contravention of the provisions of Sections 3 and 4 of the Act.

Background:

2. The Informant is the National Association of Air Cargo Agents in India; having 278 active members, 298 associate members, 42 allied members and 9 commercial members. It works to safeguard the interest of its members and provides professional assistance and guidance to its members and various government authorities connected with the International Air Cargo Transportation Industry. OP-1 has been incorporated as a non-profit company registered in Canada on 18.12.1946 through a Special Act. OP-2 is a wholly-owned subsidiary of OP-1 and is a registered Private Limited Company incorporated under the provisions of erstwhile Companies Act, 1956.

3. The Informant has alleged that OP-2 unilaterally prescribes the regulatory norms assuming to itself the regulatory power for registering, accrediting and

regulating the engagement of cargo agents by the airlines in India. It has also been averred that without any authority, OP-2 runs the licensing system for the IATA registered cargo agents by virtue of its 'Resolutions 801', *inter alia*, prescribing various registration and accreditation requirements for the Indian cargo agents and also enforcing many financial terms and conditions on cargo agents in India who are members of the Informant. As per the Informant, imposition of such financial terms is anti-competitive and affects the interest of the cargo agents.

4. Further, the Informant has avowed that OP-1 has three kinds of conferences which govern the relationship of the members of the Informant and IATA, namely, 'Agency Conference' which accredits cargo agents to IATA; 'Service Conference' which prescribes rules relating to the services to be provided by cargo agents; and 'Tariff Conference' which prescribes the terms and conditions of the tariff/ commission to be payable to the cargo agents by the airline operators.

5. The Informant has alleged that the above-mentioned unilateral actions and decisions of OP-1 prejudice the functions, market practices and interests of its members. Further, whenever there is an increase in price of aviation fuel, IATA deliberately mandates the cargo agents to collect the increased or extra prices under the head of 'surcharge' from the consumers. As a consequence, the Informant has stated that the cargo agents suffer losses of commission.

6. Moreover, the Informant has unequivocally averred that OPs have unilaterally introduced Cargo Accounts Settlement System ('CASS') in India under its 'Resolution 801'. Under CASS, the cargo agents are required to make full payment on stipulated due dates for freight and other dues to all airlines through IATA-CASS office which, in turn, would disburse the relevant amount to each individual airline. The Informant has alleged that the unilateral introduction of CASS in India under 'Resolution 801' would have the direct effect of negating two specific orders/ letters dated 11.9.2007 and

03.12.2007 issued by the Ministry of Civil Aviation and Air India, respectively, to IATA stating that the Ministry of Civil Aviation has approved the adoption of 'Resolution 815' with the reservation that a commission of 5% shall be paid to IATA accredited agents/ intermediaries under 'Resolution 815', and all agents/ intermediaries shall be given airway bills stocks by all airlines. In light of the aforesaid, the Informant has also alleged that IATA under 'Resolution 016aa' prescribes the rate of commission to be paid to the cargo agents.

7. Moreover, the Informant has also submitted that anti-trust issues were raised against IATA/ OPs in other jurisdictions like the USA and EU. Accordingly, the Informant has requested that the conferences and rules framed by IATA, which are in the nature of agreement between the Informant and IATA, are required to be scrutinised by the Commission under the provisions of Sections 3 and 4 of the Act.

Directions to the DG:

8. The Commission after considering the entire material available on record *vide* order dated 21.03.2013 passed under the provisions of Section 26(1) of the Act, *prima facie* found the OPs to be in contravention of the provisions of Section 3(3) of the Act. Accordingly, the Commission directed the Director General ('DG') to cause an investigation into the matter and submit the investigation report to the Commission.

9. The DG, after receiving the directions from the Commission, investigated the matter and after seeking extensions submitted the investigation report on 22.12.2014.

Investigation by the DG

10. Primarily, two issues had been examined by the DG during the investigation. These are: (a) Whether the Opposite Parties/ OPs, by determining the rate of cargo agents' commission in India through 'Resolution 016aa', have violated the provisions of Section 3(3)(a) of the Act; and (b) Whether the implementation of CASS by IATA through 'Resolution 851' in India has contravened the provisions of Section 3(3)(b) of the Act?

11. The DG has reported that the members of the Opposite Parties are 'enterprises' engaged in providing air cargo transport services and any decision arrived at amongst their members at conferences would amount to an agreement in terms of the Act.

12. On the first issue, the DG had stated that OP-1, through its 'Resolution 016aa', had fixed 5% as commission to be payable to the cargo agents and made it mandatory for the airlines not to pay more than 5% commission to them. The said resolution was applicable to the cargo agents of all the countries, except the USA and ECCA ('European Common Aviation Area'). Based on the responses of Air India, Jet Airways, Cathay Pacific, Indigo, Lufthansa Cargo AG and Skyways Air Services (P) Ltd., the DG had reported that the rate of commission was prevalent until it was rescinded on 04.02.2013. Further, 5% commission was a uniform practice followed by the airlines and the cargo agents without any dispute until the 'Resolution 815' was introduced in 2006 and the rate of commission was never discussed bilaterally between the airlines and the cargo agents.

13. The DG also noted that 'Resolution 016aa' was followed only till 2006 and on the basis of a specific request from the Informant, 'Resolution 815' was introduced. The DG had observed that when the draft of 'Resolution 815' was submitted to the Ministry of Civil Aviation by Air India, being the national carrier, it was found by the Informant that the decision of 'Resolution 016aa'

with respect to the fixing commission for the cargo agents was missing and the same was left to be decided bilaterally as per 'Resolution 815'. Thereafter, the Informant approached the Ministry of Civil Aviation to intervene into the matter. It was also reported by the DG that when OP-1 and the airlines wanted to do away with any commitment on fixed commission through the new 'Resolution 815', the Informant requested the Ministry of Civil Aviation in August 2006 to allow continuation of 5% commission to the cargo agents. In this regard, the DG referred to a letter dated 02.08.2006 from the Informant to the Ministry of Civil Aviation urging the Ministry to place a reservation on 'Resolution 815' to the extent that a minimum commission of 5% would continue to be payable to the cargo agents. In response to the Informant's letter the Ministry of Civil Aviation issued a letter dated 30.08.2007 to Air India approving the 'Resolution 815' with a reservation that a commission of 5% shall be paid to IATA accredited agents/ intermediaries under 'Resolution 815' and all agents/ intermediaries shall be given airway bills stocks by all airlines. Subsequently, the airlines continued to pay 5% commission to air cargo agents.

14. Further, the DG referred the minutes of meeting of the 12th Joint Council of Indian Air Cargo Program ('IACP') held on 17.08.2012 showing that OP-1 was not in favour of mandatory payment of a fixed commission or mandatory provision of airway bills distribution to all agents/ intermediaries on the basis that different airlines have different sales and distribution strategies.

15. The DG reported that the conduct of OP-1 in respect to fixation of commission to be paid to the cargo agents after 2006 cannot be held to have contravened the provisions of Section 3 of the Act. The DG reasoned that the provisions of Section 3 of the Act were notified only in May 2009 and OP-1 had initiated the changes regarding fixation of the commission payable to the cargo agents in India through 'Resolution 815' well before 2009. Though 'Resolution 016aa' was rescinded only in 04.02.2013, it was no more complied with once 'Resolution 815' was introduced. Thus, the DG

concluded that since the practice of 5% commission to cargo agents was continued due to the insistence of the Informant and the Ministry of Civil Aviation, the same cannot be attributed to the OPs. Thus, the OPs cannot be held to have violated the provisions of Section 3(3)(a) of the Act.

16. On the issue of CASS, the DG had reported that it was a simplified billing and settlement system of accounts between the airlines and the freight forwarders or cargo agents. Under this system, the cargo agents are required to make payments to IATA-CASS office which, in turn, disburses the relevant amount to each individual airline. As per the DG report, CASS was first introduced in Japan in 1979 and has been implemented over 81 countries including the UK, EU, Australia, Pakistan, *etc.* and it was running in pilot stage in India with effect from 16.05.2013 and continued to remain so until OP-1 was satisfied that the agents and airlines were familiar with the procedures under CASS.

17. Further, as per the DG report, the Informant was aware of the implementation of CASS in India and had also supported the same. The minutes of the first Joint Council meeting of IACP held on 26.03.2008 confirmed the same, wherein, Mr. Nagarwala, ex-President of the Informant, clarified that the impression in the mind of the industry was that the Informant was against CASS, which was incorrect. Thus, as per the DG, extensive negotiations and consultations were undertaken prior to the introduction of CASS and the Informant was a part of the same.

18. Lastly, the DG noted that CASS had not been made mandatory in India and was still at the pilot stage. Further, clauses of 'Resolution 851' did not indicate that it would limit or restrict the international air cargo transportation services in India. The DG, therefore, concluded that by introducing CASS OP-1 had not violated the provisions of Section 3(3)(b) of the Act.

Consideration of the DG Report by the Commission

19. The Commission had carefully perused the Information, the report of the DG and the replies/ objections/ submissions filed by the Informant and the Opposite Parties and other material available on record. The Commission also heard the arguments advanced by the counsels who appeared on behalf of the Informant and Opposite Parties on 26.03.2015. The Commission noted that the allegation of fixing of the rate of commission for cargo agents by the OPs under 'Resolution 016aa' does not hold valid and therefore, the OPs had not contravened the provisions of Section 3(3)(a) of the Act.

20. The Commission also observed that CASS has brought much advantage both for the carriers and agents. Moreover, the Commission noted that CASS will enhance economies of scale, standardisation, and automation in the collection and distribution of revenue. It was also highlighted that having CASS programme would lead to creation of neutral settlement office, elimination of loss of invoice, enhanced financial control, reduced personnel and administrative costs, *etc.*

21. The Commission further noted that in India, CASS was not compulsory for the cargo agents and that entry and exit routes are available for every airline and agent. Moreover, CASS was not fully functional in India as it was still in pilot stage. The Commission also noted from the minutes of the 61st meeting of the IATA Consultative Council that OP-1 had already clarified that collection of surcharges was strictly bilateral issue between the airlines and the freight forwarder/ cargo agents and that there was no unilateral decision to be taken by the parties unless jointly agreed. Thus, there was no extra cost to an agent as a result of CASS billing. In light of the aforesaid observations, the Commission held that introduction of CASS was not anti-competitive in terms of provisions of Section 3(3)(b) of the Act, as alleged by the Informant.

22. With respect to the allegation that OPs were controlling the market of the services of cargo agency by licensing and permitting this service to only those cargo agents who agree to become accredited to IATA by prescribing stringent financial guidelines under existing 'Resolution 801', the Commission noted that IATA played the role of self-regulator in the sector and as such the accreditation provided by IATA was not mandatory and hence, cannot *per se* be taken as anti-competitive. Further, the Commission also observed that such accreditation helped the stakeholders in providing assurance about the quality of services provided by the cargo agents. Accordingly, the Commission held that it cannot be termed as anti-competitive within the meaning of Section 3(3) read with Section 3(1) of the Act.

23. Accordingly, the Commission was of the opinion that the OPs had not contravened any of the provisions of Section 3(3) of the Act. In light of the aforesaid findings and agreeing with the recommendations of the DG, the Commission *vide* order dated 04.06.2015 closed the matter under the provisions of Section 26(6) of the Act.

Order of erstwhile Hon'ble COMPAT

24. Subsequently, the Informant preferred an appeal before the Competition Appellate Tribunal ('COMPAT') and COMPAT, *vide* its order dated 15.11.2016, allowed the appeal of the Informant and set aside the order dated 04.06.2015 of the Commission directing the DG to conduct a fresh investigation into the matter and return findings on each of the allegations of the Informant, including that of abuse of dominant position, and submit its investigation report to the Commission. The relevant excerpt of the COMPAT's order is reproduced as under:

> *'…The impugned order is set aside and the DG is directed to conduct fresh investigation into the allegations levelled by the appellant against the respondents and submit a report to the Commission*

under Section 26(3) of the Act read with Regulation 20(4) of the Regulations within a period of sixty days from the date of receipt of this order. If the DG is unable to submit fresh investigation report within sixty days, then he may approach the Commission for extension of time for submission of the fresh investigation report. After receipt of the report, the Commission shall give opportunity to the parties to file their reply / objections to the findings recorded by the DG, hear them and pass appropriate order in accordance with law…'

25. The DG, after receiving the directions from the erstwhile COMPAT, investigated the matter and after seeking extensions, submitted the investigation report on 14.06.2018.

Fresh Investigation by the DG

26. In its second investigation report, the DG had considered the relevant period for analysing the alleged conduct of the OPs as 2009-10 to 2012-13 and had identified following issues for determination:

i. Whether the OPs are 'enterprise(s)' in terms of provisions of Section 2(h) of the Act for the purpose of Section 4 of the Act or not?

ii. If the answer to Issue (i) above is in affirmative, what is the relevant market and whether the OPs are dominant in the said relevant market during the relevant period?

iii. If the answer to Issue (ii) above is in affirmative, whether the conduct of the OPs is in contravention of the provisions of Section 4 of the Act or not?

iv. To examine and consider any fresh evidence to ascertain whether the conduct of the OPs is in contravention of the provisions of Section 3 of the Act or not?

27. The DG made a detailed analysis to ascertain as to whether OPs fall within the meaning of the term 'enterprise' as defined under Section 2(h) of the Act.

The DG concluded that OPs cannot be said to be engaged in economic and commercial activities as provided under Section 2(h) of the Act and accordingly, they cannot be termed as enterprises for the purposes of Section 4 of the Act. As such, the DG opined that conduct of such an association cannot be examined under Section 4 of the Act and no finding was returned in respect of the relevant market and abusive conduct therein, if any.

28. With respect to the allegation pertaining to contravention of the provisions of Section 3 of the Act, the DG noted that there was no evidence on record which can establish infringement of the provisions of Section 3 of the Act.

Consideration of the fresh DG report by the Commission

29. The Commission considered the fresh investigation report/ 2nd investigation report of the DG in its ordinary meeting held on 04.10.2018 and *vide* its order dated 25.10.2018 observed that holding trade associations as 'enterprise' or otherwise, is a case by case approach, depending on the nature of activities performed by such associations.

30. The Commission further noted that the touchstone of an enterprise is that the entity should be engaged in activities specified under Section 2(h) of the Act related to goods or provision of services barring activities relatable to the sovereign functions of the Government and all activities carried on by the departments of the Central Government dealing in the atomic energy, currency, defence and space. It was emphasized that an economic activity may not necessarily be for profit motive. In other words, even non-commercial activities would be subject to scrutiny under the provisions of the Act if the entity under examination passes the economic activity test. Further, 'enterprise' as envisaged in the Act is any entity engaged in economic and/ or commercial activity and it is the functional aspect and not the institutional aspect of an entity that is paramount in determining whether it is an 'enterprise'. It is the nature of the activity which determines whether it is

economic in nature and not the form of the institution.

31. In the above backdrop, the activities of OPs were examined to determine as to whether they were in the nature of economic activity or not.

32. In this regard, it was observed that in the first place, IATA India is a wholly-owned subsidiary of IATA, which is present in India in the form of a branch office. Therefore, OPs constituted group entities in terms of Explanation to Section 5 of the Act. It was also observed that IATA India has been formed for rendering advisory and other services in relation to the aviation industry and to act as a representative of IATA in India. It was further noted that IATA renders various services like intelligence and statistics, financial services, consulting, advertising, advocacy, member and external relations activities, safety, operations and infrastructure; liaising with aviation industry intermediaries *etc*. while some of these services may not be economic in nature, some may be.

33. It was noted that income of OP-1 is reported under three heads, namely: (i) Sale of product and services; (ii) Interest income; and (iii) Share of profit in a joint venture. In this context, the DG found that the main source of income of IATA International during the year 2010, 2011, 2012 and 2013 was from sales of product and services and contribution from member airlines for Billing and Settlement Plan (BSP) operations, which facilitates remittances from cargo agents to various airlines. On the other hand, revenue generated by IATA India, which is explained to be in the form of rendering sale of services in relation to the aviation industry and to act as a representative of IATA in India, comprises of reimbursement of expenses on activities performed on behalf of IATA and interest accrued on the surplus funds available and invested by IATA. Accordingly, the Commission noted that some of the services provided by OPs were rendered on 'payment of fees' basis.

34. In view of the above, the Commission was of the view that some categories of activities undertaken by OPs were in the nature of economic activities, albeit for not-for-profit motive, as claimed by OPs. Accordingly, the Commission held OPs to be 'enterprise' in terms of the provisions of the Act.

35. Further, the Commission opined that the conduct of OPs needed to be investigated in the relevant product market *i.e.* '*market for account settlement services in respect of air cargo segment'*. Liberty was, however, granted to the DG to determine any other appropriate relevant market(s) after considering the facts and material on record.

36. Accordingly, the Commission, *vide* order dated 25.10.2018, passed in terms of the provisions contained in Regulation 20(6) of the Competition Commission of India (General) Regulations, 2009, directed the DG to conduct further investigation/ analysis in the present matter in light of observations made therein and to submit a detailed supplementary investigation report.

37. The DG, after receiving the aforesaid direction of the Commission, investigated the matter and, after seeking extensions, submitted supplementary investigation report/ 3rd investigation report on 07.11.2019.

Supplementary Investigation by the DG

38. In its supplementary investigation, the DG considered the 'relevant period' for analysis of the issues and data as well as examination of the alleged conduct of OPs from 2009-10 to 2012-13. Further, the DG delineated the 'relevant market' as '*market for account settlement services in respect of air cargo segment in India*'. In this relevant market, OPs were not found to be enjoying a dominant position.

Consideration of the DG report by the Commission

39. The Commission in its ordinary meeting held on 29.01.2020 considered the fresh investigation report/ 2nd investigation report and supplementary investigation report/ 3rd investigation report submitted by the DG and decided to forward copies thereof to the Parties, as specified therein, for filing their respective replies/ objections thereto. The matter was directed to be listed for final hearing on 15.04.2020 wherafter the matter was adjourned from time to time due to restrictions imposed in the wake of outbreak of the pandemic *i.e.* COVID-19 and at the request of the parties. Finally, the matter was heard on 11.11.2020 through video conference ('VC') and on completion of arguments, the Commission decided to pass an appropriate order in due course.

Replies/ Objections/ Submissions of the Informant

40. The Informant filed its respective replies/ objections/ submissions to the report of the DG besides making oral submissions.

41. The Informant has raised certain preliminary objection to the DG Report that the DG did not obtain fresh testimonies on 'oath' of any individuals of either of the parties but has only relied upon an old testimony on 'oath' of 2014. Moreover, with the setting aside of the Commission's order dated 04.06.2015 by the erstwhile COMPAT, the earlier investigation of the DG became infructuous.

42. The Informant has also challenged the fact that the DG has relied on the informal discussion with Mr. Rodney D'Cruz of OP-2 to refute the liability of OPs even though there was no deposition on oath and thus was not open for cross-examination. Accordingly, the Informant has stated that such informal discussion must be expunged from the DG Report as being *void* in the eyes of law.

43. The Informant has also submitted that the DG Report failed to consider the decision of the Commission in case *M/s Shivam Enterprise* v. *Kiratpur Sahib Truck Operators Co-operative Transport Society Limited and other* (Case No. 43 of 2013), wherein the Commission held that even the 'trade associations' can fall foul of the provisions of Section 4(1) of the Act.

44. The Informant has also averred that OPs are 'enterprises' engaged in 'profession', 'occupation', 'trade' and 'provision of services' that collectively constitute 'economic activities'. Moreover, as per the Informant, even the constituent members of OPs are engaged in 'economic and commercial' activities and OPs provide a common platform to all constituent members by way of professional services to enhance their economic and commercial interests. In the same breath, the Informant has also stated that it is not correct on part of the OPs to state that they are financially 'hands to mouth' enterprise, as otherwise OPs would not have been able to operate and grow by leaps and bounds. Moreover, the Informant has also stated that the opinion of the RBI regarding nature of activities of IATA in 1995 cannot be cited as a conclusive proof that activities of IATA in 2020 are still 'non-economic' in nature.

45. The Informant has reiterated that as per the Cargo Agency Programme of IATA under IATA Resolution 801, only those air cargo agents who are accredited with IATA can engage in business dealings with IATA member airlines. Further, as per the Informant, the cargo agents have to pass mandatory investigation and accreditation procedure according to the financial and other criteria set by IATA in order to engage in business with member airlines of IATA. Thus, as per the Informant, OPs act as a direct entry barrier between the cargo agents and the airline companies. Further, the Informant has denied the submissions of OPs that all resolutions of IATA are decided and passed in joint consultation with ACAAI/ members of the Informant (who are part of Federation of Freight Forwarders Association/ FIATA) as clause 1 of Resolution 801c states that IATA/ FIATA

Consultative Council ('IFCC') gives recommendation on issue affecting carrier/ agent relationship. The Informant has stated that the said contention is false and misleading as the clause 1.5 of Resolution 801c states that IATA is under no obligation to accept such recommendation, if it disagrees with IFCC.

46. With respect to the relevant market, the Informant has stated that there are two domains of the air cargo transport business, *i.e.* (i) transport of cargo in domestic market and (ii) transport of cargo in international (inbound and outbound cargos) markets. Wherein, in the year 2018, domestic and international air cargo business constituted 20.62% and 79.36% of total air cargo business in India, respectively. Moreover, as per the Informant, in the year 2018, in the International air cargo transport sector, 92.25% of the international import freight and 88.52% of international export freight was carried by IATA member airlines. Thus, the Informant has emphasised that in the delineation of the relevant market, the domestic air transport should not be considered as the domestic cargo market has different conditions of operation than the international cargo market, which results in exclusion of the domestic cargo market from the consideration of the present case.

47. Similarly, the Informant has also stated that the relevant product/ service market must be broad and include overall commercial services offered by IATA to the air cargo industry and not be restricted to only account settlement function. The rationale for the same being that IATA's commercial conduct also extends to other areas such as laying down technical standards/ standard procedure for cargo handling besides laying down strict mandates to handle dangerous goods, *etc.* Accordingly, the Informant has argued that the relevant market in the matter should be taken as the *'the services of facilitating international cargo business (inbound and outbound) with international airlines in India'*.

48. Further, the Informant has also raised objection to the DG report on the ground that the DG has limited the 'relevant period' from 2009-10 to 2012-13 and has not provided any reason whatsoever for the same. Moreover, as per the Informant, even the order of the Commission or the erstwhile COMPAT had not restricted the duration of the investigation and it was only after 01.06.2015 (date of implementation of CASS) that the onerous nature of CASS and anti-competitive effect was manifested.

49. On the issue of dominance of OPs, the Informant has stated that the DG in its analysis has tried to distinguish the activities of the airlines (members of IATA) and that of IATA but has not provided any reasons for drawing such distinction. Moreover, as per the Informant, OPs hold a dominant position in the delineated relevant market as predominant proportion of the international cargo business (in terms of tonnage) is conducted through IATA's member airlines which was around *i.e.* 90.14% - 93.53% in year 2017. Therefore, the Informant has alleged that when more than 90% of India's International air cargo traffic is operated by IATA member airlines, cargo agents have no other option but to follow the abusive conduct of IATA. In the same breadth, the Informant has also alleged that the criteria adopted by the DG to calculate the market share of CASS (based on number of airlines that have adopted CASS system) is inconceivable, rather, it should have been based on volume of freight carried by the airlines. The Informant has also stated that out of 87 airlines operating in India in the year 2015-16, only 12 airlines were operating on CASS system. However, out of the total freight, approximately 67% of freight tonnage was carried out by IATA member airlines operating on CASS system. In other words, although only 17.10% of airlines had adopted CASS system but they were carrying 67% of total freight tonnage in India. Thus, the Informant has submitted that OPs are dominant even in the relevant market delineated by the Commission/ DG.

50. Further, with respect to abuse of dominant position by OPs, the Informant has stated that the DG has limited the investigation of abuse of dominant position only to CASS, however, it has failed to analyse the other aspects of the arbitrary and unilateral conditions imposed on cargo agents by IATA. Some of the alleged abuse of dominant position as highlighted by the Informant are restrictive and unfair nature of Resolution 801 and Resolution 851 prescribing unilateral financial conditions on cargo agents; payment of mandatory fee for change in nature of business entity of air cargo agents; imposition of discriminatory business conditions for Indian cargo agents and non-Indian cargo agents; lack of availability of legal recourse against the decision of arbitration board; imposition of various kinds of fees on air cargo agents such as application fees, registration fees, annual agency subscription fees, mandatory accreditation with IATA for becoming member of the Informant *etc.* The Informant has also averred that the DG has failed to consider the fact that the Informant was burdened with the liability of maintaining two IATA certified employees for handling dangerous goods, even though the same conditions are not imposed or mandated in Europe.

51. The Informant has also alleged that IATA in abuse of its dominant position has imposed onerous terms and conditions for payment through CASS system impacting the financial position of the members of the Informant. The Informant has also alleged that cargo agents who choose not to participate in the CASS are marginalised as IATA member airlines clearly declare/ indicate through communications that air waybill stock/ space would be given only to those cargo agents who participate in IATA's CASS Programme. It has also been averred that CASS system imposes strict deadlines for payment of entire freight charges without any grace period (regardless of the fact that cargo agents have been paid by the shippers or not) and also imposes penalty under the guise of administrative fees. The Informant has also submitted that CASS is not mandatory for member airlines as they can choose not to opt for it, but if an airline opts for CASS, the cargo agent in order to deal with the member airline is compelled to opt for CASS. Further, the Informant also vehemently

stated that if a payment dispute arises between a cargo agent and an airline, then CASS system immediately puts the cargo agent on cash basis as payments from all airlines are pro-rata deducted by CASS system. Thus, such action leaves the cargo agent in default with all participating airlines in spite of having a dispute with only one airline and CASS system also negates the scope of bilateral negotiation with the member airline. Lastly, the Informant has also challenged the sharing of competitive information of cargo agents with and between the airlines using Cargo Intelligence Solutions ('Cargo IS').

52. The Informant has further submitted that OPs have instructed their member airlines not to deal with the agents who do not subscribe to CASS system.

53. The Informant has also stated that recently IATA and International Federation of Freight Forwarders Association ('FIATA') have collaborated to introduce new global programme for the air freight industry, *i.e.* IATA - FIATA Air Cargo Programme ('IFACP') for making the functioning of the air freight forwarders more conducive and for better working relationship between IATA and cargo agents. However, the Informant has alleged that IATA has mandated that this programme will be implemented in India only on the pre-condition that ACAAI/ Informant withdraws its present matter against IATA before the Commission. Thus, the Informant has stated that IATA is in a position wherein it can impose unfair and discriminatory conditions upon members of the Informant.

54. The Informant has also alleged that IATA to bring its practices in tune with the competition laws has introduced various resolutions, for instance, in Europe it has introduced Resolution 805zz under the European Air Cargo Programme ('EACP'). However, IATA has not introduced any such resolution in India. Thus, *ipso facto* it appears that IATA is blatantly abusing its dominant position in certain regions, including India.

55. Lastly, the Informant has also countered the allegation of OPs that ACAAI itself mandates the accreditation of IATA in its Articles of Association. The Informant has stated that ACAAI came into existence in 1970, when IATA was already well-established. Since, it was mandatory for air cargo agents to be accredited with IATA to deal with IATA airlines, the same condition was *ipso facto* added in its Articles of Association. Moreover, a provision for removal of this condition has been made, however, the same has not been implemented only because the matter has been *sub-judice* before the Commission since 2012.

Replies/ Objections/ Submissions of the OPs

56. OPs have filed their common replies/ objections/ submissions to the reports of the DG dated 14.06.2018 and 07.11.2019, besides making oral submissions.

57. OPs have fully endorsed the DG Report dated 14.06.2018, which concluded that no fresh evidence has been put forth by the Informant which could indicate any contravention of the provisions of Section 3 of the Act and OPs are not an 'enterprise' for the purposes of Section 2(h) of the Act.

58. Elaborating further, OP-1 has stated that it is a non-profit corporation formed by an Special Act of the Canadian Parliament passed in 1947 and OP-2 has received assent of RBI on 25.11.1995 for undertaking non-commercial activities on non-profit basis. OPs have also listed out various activities carried out by them such as advocacy on safety and security measures in air transportation; advocacy on air transport industry regulations; payment and settlement services using Billing and Settlement Plan ('BSP'), *etc.* OPs have stated that the aforementioned activities are in nature of 'non-economic activities' and it merely operates as a secretariat for its constituent members. Thus, OPs have submitted that they are not an 'enterprise' for the purposes of the Act and accordingly, not amenable to the jurisdiction of the

Commission. Without prejudice to the submission that OPs are not 'enterprise', it has been stated that inquiry/ investigation should only be limited to its alleged commercial activities, *i.e.* relating to account settlement services in India.

59. It has also been vociferously submitted by OPs that they are 'association of enterprises' and thus not subject to the provisions of Section 4 of the Act, which applies only to contravention by 'one' enterprise or group. In other words, the definition of 'person' or 'enterprise' does not expressly include within itself, an 'association of enterprises'. Consequently, an 'association of enterprises' is separate and distinct from a 'person' and an 'enterprise' as defined under the Act. Thus, the scope of Section 4 of the Act does not extend to an 'association of enterprises'. Moreover, OPs have also stated that the constituent member airlines do not fulfill criteria specified for 'group' under Explanation (b) to Section 5 of the Act and the present Act also does not recognise the concept of 'collective dominance'.

60. OPs have also contended that they are not dominant in the relevant market as delineated by the Commission in its order dated 25.10.2018, *i.e.* the market for account settlement services in respect of air cargo segment in India. OPs have submitted that the Informant has wrongly alleged that the relevant market is the *'market for services of facilitating international cargo business (inbound and outbound) with international airlines'* as neither OP-1 nor OP-2 is present in the market for cargo business in India or elsewhere in the world, rather, air cargo agents and airlines are two major constituents of cargo business sector. Therefore, collective market shares of IATA member airlines (94.11% as emphasised by the Informant) cannot be attributed to IATA.

61. OPs have supported the findings of the DG that during the relevant period, *i.e.* 2009-10 to 2012-13, the market share of OPs in the relevant market was 'zero' as CASS was launched as a comprehensive programme only on 01.06.2015. It has also been contended by OPs that they cannot be said to be

operating independently of competitive forces as all decisions pertaining to the carrier/ agent relationship, are taken by IATA members only after getting approval from 'International Federation of Freight Forwarders Associations Consultative Council' that has equal number of IATA and IFIATA members.

62. OPs have also endorsed the finding of the DG that allegation pertaining to IATA unilaterally assuming self-regulatory power without any authority of law is misconceived. OPs have also submitted that they do not mandate accreditation of cargo agents rather it is the Informant that mandates its members, *i.e.* cargo agents to be accredited with IATA. OPs have also seconded the DG's finding that handling of dangerous goods is critical to the security of passengers, aircrafts and airports, thus, requirements for handling dangerous goods do not amount to abuse of dominant position.

63. Similarly, OPs endorsed the findings of the DG Report that IATA's conferences and resolutions do not impose any unilateral, unfair and abusive conditions on air cargo agents. Moreover, the Informant has furnished no evidence to support any of these allegations and contentions. Further, OPs have stated that there is extensive dialogue between all stakeholders (member airlines and accredited cargo agents) prior to the adoption of any resolution.

64. In respect of allegations and averments regarding CASS, OPs have submitted that introduction of CASS represents a significant upgrade over the traditional offline invoice settlement system which was error prone, time consuming and inefficient. It has also been vociferously contended by OPs that CASS is merely one of the many available account settlement systems and IATA does not mandate either the airlines or the air cargo agents to use CASS. For instance, in 2018-19, out of 18 airlines which had adopted CASS, 11 of them also had their own internal account settlement systems.

65. OPs have also rebutted and denied allegation of the Informant that rules under CASS such as strict payment schedule, non-implementation of IATA-FIATA

Air Cargo Programme, Cargo Intelligence Solutions that allow sharing of sensitive information, *etc*., are anti-competitive. Lastly, OPs have also seconded the DG's findings that OPs have neither fixed commission for air cargo agents nor they mandate collection of fuel surcharge by air cargo agents. OPs have also submitted that all price related decisions are taken independently by each airline and IATA has no role to play in this matter. OPs have strongly denied that a dispute regarding credit period and payments between an airline and an air cargo agent leads to a collective boycott of an air cargo agent by all airlines. Accordingly, OPs denied any abuse of dominant position under the provisions of Section 4 of the Act.

Analysis

66. On perusal of the Information, the Reports of the DG and the replies/ objections/ written submissions filed and submissions made by the parties and other material available on record, the Commission is of the considered opinion that principally and essentially, the issue of abuse of dominant position by OPs falls for consideration and determination in the present matter.

67. To examine the purported and alleged abuse of dominant position by OPs, it becomes imperative to first decide the issue as to whether OPs can be taken as *enterprises* within the meaning of the term 'enterprise' as defined in Section 2(h) of the Act.

68. It was vehemently submitted by OPs that the Commission in its order in *Santuka Associates Pvt. Ltd.* v. *All India Organization of Chemists and Druggists* (Case No. 20 of 2011) has held that in the case of an association of enterprises, it is the association itself that must be engaged in economic activity and not merely its constituent members. It was pointed out by OPs that it is IATA member airlines that conduct economic trade/ economic activities and not OPs themselves. OPs have also stated that the RBI approval

dated 25.11.1995 categorically stated that IATA is a 'non-profit organisation'. Further, OP-2/ IATA India merely provides advocacy services in India in the form of being a facilitator in the airlines industry. Thus, as per OPs, they do not earn any revenue from any aviation industry intermediary and the same is reflected from the insignificant turnover of IATA and IATA India.

69. On the other hand, the Informant submitted that OPs are engaged in various financial activities, *viz.* earning revenue from accreditation of cargo agent, training programmes, *etc*. Moreover, as per the Informant, based on the information available in public domain, the estimated annual revenue of IATA is USD 869 million which is significant and indicates that its activities are commercial in nature.

70. To appreciate the issue in proper perspective, it would be appropriate to excerpt the definition of 'enterprise' as given in Section 2(h) of the Act and the same is reproduced 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 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.*

71. Further, as per Section 2(u) of the Act, 'service' means service of any description which is made available to potential users and includes the provision of services in connection with business of any industrial or commercial matters such as banking, communication, education, financing, insurance, chit funds, real estate, transport, storage, material treatment, processing, supply of electrical or other energy, boarding, lodging, entertainment, amusement, construction, repair, conveying of news or information and advertising.

72. Thus, before an entity is considered as 'enterprise', it should be engaged in activities specified under Section 2(h) of the Act in respect of goods or provision of services barring activities 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. The thrust of the definition of the term 'enterprise' is on the economic nature of the activities discharged by the entities concerned. It is immaterial whether such economic activities were undertaken for profit making or for philanthropic purpose. Thus, even non-commercial economic activities would be subject to the discipline of the Act as the Act does not distinguish economic activities based on commercial or non-commercial nature thereof. In ascertaining as to whether an entity qualifies to be an 'enterprise', the Commission examines this aspect from a functional than a formal approach.

73. In conclusion the definition of the term 'enterprise' is wide enough and all activities, barring the sovereign functions of the Government, are amenable within the jurisdiction of the Commission.

74. In this backdrop, the Commission notes that IATA India is a wholly-owned subsidiary of IATA, which is present in India in the form of a branch office. Therefore, OPs constitute 'group entities' in terms of Explanation (b) to Section 5 of the Act. The Commission also observes that IATA India has been formed for rendering advisory and other services in relation to the

aviation industry and to act as a representative of IATA in India. The Commission further notes that IATA renders various services like intelligence and statistics, financial services, consulting, advertising, advocacy, member and external relations activities, safety, operations and infrastructure; liaising with aviation industry intermediaries, *etc*., while some of these services may not be economic in nature, some may be.

75. The Commission also notes that income of IATA is reported under three heads, namely: (i) sale of product and services; (ii) interest income; and (iii) share of profit in a joint venture. In this context, the DG has also found that the main source of income of IATA during the years 2010, 2011, 2012 and 2013 was from sales of product and services and contribution from member airlines for Billing and Settlement Plan ('BSP') operations, which facilitate remittances from cargo agents to various airlines. On the other hand, revenue generated by IATA India, which is explained to be in the form of rendering sale of services in relation to the aviation industry and to act as a representative of IATA in India, comprises reimbursement of expenses on activities performed on behalf of IATA and interest accrued on the surplus funds available and invested by IATA. It is, therefore, evident that some of the services provided by OPs are rendered on 'payment of fees' basis.

76. In view of the above, the Commission finds no merit in the objections raised by OPs that they are not enterprise and thereby not amenable to the jurisdiction of the Commission. Looking at the wider sweep of the definition of the 'enterprise' and the nature of activities undertaken by OPs, it is beyond any pale of doubt that OPs stand squarely covered within the definition of 'enterprise' as defined in Section 2(h) of the Act and their conduct can be examined within the purview of Section 4 of the Act either individually or collectively as a 'group'.

77. After disposing of the preliminary pleas, the Commission proceeds to examine the matter on merits to ascertain as to provisions of Section 4 of the Act have been contravened by OPs.

78. In this regard, first the relevant market needs to be defined and thereafter the dominance of the enterprise or group concerned has to be ascertained therein before proceeding any further to examine the alleged abusive conduct.

79. As per Section 2(r) of the Act, 'relevant market' means the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or both. Further, the term 'relevant product market' has been defined in Section 2(t) of the Act as a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of their characteristics, prices or intended use. The term 'relevant geographic market' has been defined in Section 2(s) of the Act to mean a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas.

80. For determining whether a market constitutes a 'relevant market' for the purposes of the Act, the Commission is required to have due regard to the 'relevant geographic market' and the 'relevant product market' by virtue of the provisions contained on Section 19(5) of the Act.

81. To determine the 'relevant geographic market', the Commission, in terms of the factors contained in Section 19(6) of the Act, is to have due regard to all or any of the following factors *viz*., regulatory trade barriers, local specification requirements, national procurement policies, adequate distribution facilities, transport costs, language, consumer preferences and need for secure or regular supplies or rapid after-sales services.

82. Further, to determine the 'relevant product market', the Commission, in terms of the factors contained in Section 19(7) of the Act, is to have due regard to all or any of the following factors *viz*., physical characteristics or end-use of goods, price of goods or service, consumer preferences, exclusion of in-house production, existence of specialized producers and classification of industrial products.

83. Thus, in any case of alleged abuse of dominant position, delineation of relevant market is important as it sets out the boundaries of competition analysis. Proper delineation of relevant market is necessary to identify in a systematic manner, the competing alternatives available to the consumers and accordingly the competitive constraints faced by the enterprise under scrutiny. The process of defining the relevant market is in essence a process of determining the substitutable goods or services as also to delineate the geographic scope within which such goods or services compete.

84. In light of the aforesaid statutory landscape, the Commission proceeds to determine the relevant market in the instant case.

85. In regard to the relevant market, the Informant has submitted that the DG has erroneously limited the scope of the relevant market to account settlement and has not extended it to other areas such as laying down technical standards, standard procedure for cargo handling including special provisions for handling hazardous cargo, *etc.* Moreover, in the delineation of the relevant market, domestic air transport should not be considered as the characteristics of domestic air transport are different from international air transport. Further, as per the Informant, 92.25% of international import freight and 88.52% of international export freight was carried by IATA airlines in the year 2018. Therefore, as per the Informant, the relevant market in the present case should be delineated as '*services of facilitating international cargo business (inbound and outbound) with international airlines in India'.*

86. On the other hand, OPs have agreed with the relevant product market as delineated by the Commission in *vide* its order dated 25.10.2020, *i.e.* the market for account settlement services in respect of air cargo segment, which was also adopted by the Commission for the purposes of investigation into contravention of the provisions of Section 4 of the Act.

87. In the present case, the major grievance of the Informant seems to be related to accreditation of cargo agents and introduction of CASS in India by OPs and alleged imposition of unilateral, unfair and abusive conditions by IATA on the cargo agents through its resolutions.

88. OPs have pointed out that CASS was designed to simplify the billing and settling of accounts between airlines and freight forwarders/ cargo. It operates through CASS link, an advanced, global, web-enabled e-billing solution. The Industry Distribution and Financial Services ('IDFS') division of IATA manages CASS. All airlines are eligible to participate whether they are members or non-members. Airlines have to pay fees for joining CASS. Further, membership of IATA in not required for joining CASS. It is open to all participants, *i.e.* all airlines and all cargo agents (based on certain eligibility criteria). Thus, CASS is not confined to IATA members only.

89. In light of the statutory landscape and the factors provided thereunder for determining relevant product market, the Commission notes that the relevant product market would comprise all services available to air cargo agents for settling their bills or invoices by the airlines for air cargo and accordingly, the Commission is of the opinion that the relevant product market in the present case may be taken as '*market for account settlement services in respect of air cargo segment*'.

90. As regards 'relevant geographic market', it is observed that although account settlement services available may vary across countries, account settlement services identified by the DG, *viz.* 'Cargo Accounts Settlement System'

(CASS) operated by IATA (OPs), 'SmartKargo' (SpiceJet's own System/ Software), CASS + 'Logistics Management System' (LMS) of Air India Ltd., CASS+ 'Simplified Interline Settlement' (SIS) of Jet Airways and Internal Account Settlement System/ Software of Indigo, CESAR Export of Lufthansa Cargo, SkyChain Carrier Billing of Emirates, Rapid of British Airways and Cargospot of Swiss International Airlines *etc.*, appear to be uniformly offered throughout *'India'*. Accordingly, in light of the aforesaid and statutory provisions, the 'relevant geographic market' may be taken as *'India'*.

91. Thus, after careful consideration of the facts, circumstances and statutory provisions of the Act, the relevant market in the present case may be delineated as '*market for account settlement services in respect of air cargo segment in India*'.

92. After delineation of the relevant market, the Commission proceeds to examine the issue of dominance of OPs therein.

93. In this regard, the Informant contended that it is impossible for a cargo agent to deal with an IATA member airline without being *de facto* subjected to the terms and conditions under IATA cargo agency programme. Furthermore, more than 90% of India's international air traffic is operated by IATA member airlines, compelling air cargo agents to deal with IATA member airlines in order to do business as a cargo agent. Thus, the Informant argued that IATA is dominant in the relevant market.

94. On the other hand, OPs contended that IATA India does not provide CASS or any account settlement services in India. Therefore, its market share is 'zero'. Further, even during the relevant period of 2009 to 2013, there was no airline that used CASS, thus, the market share of IATA in the relevant period was 'zero'. Accordingly, as per OPs, the Informant's members had 100% option to deal with 100% of airlines to avail the '*market for account*

settlement services of air cargo segment in India'. OPs have challenged the submissions of the Informant that OPs have the market shares of 67% - 94.11%. OPs have submitted that market share as quoted by the Informant is incorrect because the Informant misleadingly attributed the market shares of the total volume of cargo handled by IATA member airlines to IATA, *i.e.* implying collective dominance, a concept which has been rejected by the Commission in catena of its decisions.

95. At the outset, the Commission notes that Section 19(4) of the Act provides that while inquiring whether an enterprise enjoys a dominant position or not in the relevant market under Section 4 of the Act, the Commission shall have due regard to all or any of the factors provided therein. These factors are: the market share of the enterprise, size and resources of the enterprise, size and importance of the competitors, economic power of the enterprise, dependence of consumers on the enterprise, monopoly or dominant position acquired by virtue of a statute or by virtue of being a government company or a public sector undertaking, entry barriers, countervailing buyer power, social obligation and social cost; relative advantage, by way of contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition and any other factor which the Commission may consider relevant for the inquiry. Thus, the Act provides flexibility to the Commission to look into factors that are not covered explicitly in Section 19(4) of the Act, but are relevant for determining dominance in the relevant market. The Commission has to assess various relevant factors in an objective manner and has to determine the position of dominance of the OP in the relevant market. The objective is to identify the ability of the enterprise concerned to operate independently of the competitive forces prevailing in the relevant market or to affect its competitors or consumers or the relevant market in its favour. The importance attached to the various factors by the Commission would differ depending on the facts of each case and also depending on specificity of each information and the sector of economic activity involved.

96. On examination of the data collected by the DG, the Commission observes that the DG has examined the data as available from the official website of the DGCA and from other sources and noted that during the relevant period, *i.e.* 2009-10 to 2012-13, there was 'No' airline which was on CASS, but all airlines were using their own account settlement services/ systems in respect of air cargo segment in India with the cargo agents.

97. Further, the DG has also stated that in the year 2013-14, CASS was adopted by only 7 airlines out of 76 airlines, which works out to be 9.21% of the available airlines during its introductory year, *i.e.* 2013-14. Thus, balance 69 airlines *i.e.* 90.79% were still available for the cargo agents to deal with the account settlement services in respect of their bills/ accounts *etc*. Moreover, as per the DG, even out of those 7 airlines, which had adopted CASS in 2013-14, some of them continued to use their own internal system / software for account settlement services in respect of air cargo segment in India, which means they were having dual system, *i.e.* CASS and their own internal system for accounts settlement with cargo agents.

98. Elaborating further, the DG has pointed out that in the subsequent years, *i.e.* 2014-15, 2015-16, 2016-17, 2017-18 and 2018-19, the percentage of airlines which adopted CASS was 11.84%, 15.85%, 16.09%, 17.05% and 21.18%, respectively. Thus, the percentage of airlines which were not using CASS but using their own/ internal account settlement services in respect of air cargo segment in India ranged between 78.82% to 88.16%. For sake of convenience, the aforesaid data is reproduced in form of a table herein below:

Number of Airlines who adopted CASS since its introduction

Year	CASS adopted Airlines (To and	Total Airlines*	% share of Airlines, which are	% share of Airlines, which are	Cargo Agents on CASS

	From India)		using CASS	NOT using CASS	
2009-10	0	74	0	100%	0
2010-11	0	74	0	100%	0
2011-12	0	76	0	100%	0
2012-13	0	79	0	100%	0
Beyond relevant period ⇩					
2013-14	7	76	9.21%	90.79%	23#
2014-15	9	76	11.84%	88.16%	247
2015-16	13	85	15.85%	84.15%	313
2016-17	14	87	16.09%	83.91%	369
2017-18	15	88	17.05%	82.95%	406
2018-19	18	85**	21.18%	78.82%	429

Number of IATA registered air cargo agents in India were 653 during 2013-14.

** Considered the highest Airlines registered during the FY Q1-84, Q2-81, Q3-85, Q4-83.

99. Having considered the aforesaid findings of the DG, material available on record and submission of the parties, it is evident that OPs were not enjoying any dominant position in the relevant market during the relevant period for the purposes of the provisions of Section 4 of the Act. The rationale being that during the relevant period, *i.e.* 2009-10 to 2012-13, the market share of OPs was 'NIL'. Moreover, even beyond the relevant period, the market share of OPs was never more than 21.18%. Further, from the DG Report, the Commission also notes that even the airlines which were on CASS continued to use their own account settlement services/ systems in respect of air cargo segment in India.

100. The Commission also notes that CASS was not mandatory but an option for cargo agents, thus, there existed substitutability in the relevant market. Thus, the air cargo agents had the option to switch to alternative account settlement system. Moreover, the DG Report has categorically noted various available

alternative payment settlement system *viz.* 'SmartKargo' (SpiceJet's own System/ Software), CASS + 'Logistics Management System' (LMS) of Air India Ltd., CASS + 'Simplified Interline Settlement' (SIS) of Jet Airways and Internal Account Settlement System/ Software of Indigo. CESAR Export of Lufthansa Cargo, SkyChain Carrier Billing of Emirates, Rapid of British Airways and Cargospot of Swiss International Airlines, *etc.* that were uniformly offered throughout *'India'*.

101. For the foregoing reasons, the contention of the Informant that the criteria adopted by the DG to calculate the market share of CASS based on number of airlines that have adopted CASS system than the volume of freight carried by airlines, is of no consequence since, as submitted by OPs and as noted hereinabove, CASS was not mandatory but an option for cargo agents. As such, it is unnecessary to deal with this contention any further.

102. Accordingly, in light of the aforesaid, the Commission is of the considered opinion that OPs did not enjoy a position of strength in the relevant market so as to enable them to operate independently of competitive forces prevailing in the relevant market; or affect their competitors or consumers or the relevant market in their favour. As OPs did not enjoy dominant position in the relevant market, question of abuse of dominant position would not arise.

103. Before concluding, the Commission deems it appropriate to note the submission of the Informant to the effect that the DG should have examined the allegations *de novo* including that of the allegations under the provisions of Section 3 of the Act as the very edifice of the order of the Commission dated 04.06.2015 was removed once the erstwhile COMPAT set it aside *vide* its order dated 15.11.2016. The Informant has also contended that the DG has selectively relied on the oral depositions conducted in the year 2014 and facts from the period 2010-2014, which were set aside on merits by the erstwhile COMPAT, while remanding the matter back to the Commission.

104. In this regard, it is observed that so far as the allegations pertaining to contravention of the provisions of Section 4 of the Act are concerned, in the absence of dominance of OPs in the relevant market, the issue of abuse did not arise.

105. As regards the aforesaid contention in the context of allegations pertaining to contravention of the provisions of Section 3 of the Act is concerned, OPs submitted that the DG was correct in not re-investigating baseless allegations of violations of the provisions of Section 3 of the Act as no fresh evidence of violation of Section 3 of the Act, was put forth by the Informant before the DG.

106. In this regard, it is observed that no fresh material was placed before the DG by the Informant necessitating a further examination and the Commission agrees with the OPs that there was no occasion before the DG to examine the matter in the absence of any new material placed by the Informant before the DG. In these circumstances, no fault can be found with the course adopted by the DG in adopting the first investigation report dated 22.12.2014 to the extent which dealt with the issue of alleged contravention of the provisions of Section 3 of the Act. There appears to be no merit in the contention of the Informant. In the garb of fresh investigation, the Informant is trying to seek enlargement of the relevant period for the purposes of investigation, which is not permissible.

107. Moreover, it is observed that the original order of the Commission dated 04.06.2015 was set aside by the then Hon'ble Appellate Tribunal (COMPAT) in the context of non-determination of the issue of contravention of the provisions of Section 4 of the Act by OPs as alleged by the Informant in the Information, which is borne out from the following observations of the erstwhile Appellate Tribunal's order dated 15.11.2016 while setting aside the order of the Commission and remanding the matter to the DG for fresh investigation:

28. On the basis of the above discussion, we hold that the DG committed serious illegality by not recording a finding on the allegation of abuse of dominant position and consequential violation of Section 4 of the Act levelled by the appellant against Respondent Nos. 2 and 3 and the impugned order is liable to be set aside because the Commission failed to take cognisance and decide the plea raised by the appellant in the context of the said illegality committed by the DG.

108. Be that as it may, in the absence of any fresh material or evidence in respect of the allegations pertaining to contravention of the provisions of Section 3 of the Act, the contention of the Informant is not well-founded.

109. In light of the view taken by the Commission on the merits of the case, it is unnecessary to deal with the other objections raised by the Informant challenging the mode and manner of investigation conducted by the DG.

ORDER

110. In view of the foregoing discussion, no case of contravention of the provisions of the Act is made out against any of the Opposite Parties and the matter is directed to be closed forthwith.

111. 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: 31/03/2021