

Competition Commission of India

Case No. 19 of 2011

September 30, 2011

Arun Kumar Tyagi

Informant

v.

The Software Engineering Institute

Opposite Party No. 1

The High Court of Uttarakhand

Opposite Party No. 2

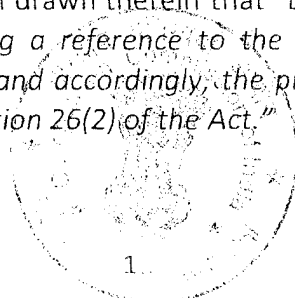
The HCL Technologies Ltd.

Opposite Party No. 3

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

Per M.L. Tayal, Member (Supplementary)

1. The present information has been filed before the Competition Commission of India (hereinafter referred to as "the Commission") by Mr. Arun Kumar Tyagi (hereinafter referred to as "Informant") on 21.04.2011 under Section 19 (1) (a) of the Competition Act, 2002 (hereinafter referred to as "the Act").
2. The information in this matter has been filed against the Software Engineering Institute, USA (hereinafter referred to as the "OP 1"), the High Court of Uttarakhand (hereinafter referred to as "OP 2") and the HCL Technologies Ltd. (hereinafter referred to as "OP 3") with the allegation that the Opposite Parties have acted in concert in the tendering process for procurement of computer software by OP 2 for digitizing its old records with a view to kill free and fair competition and to eliminate other competitors from the bidding process.
3. The Commission has passed an order dated 30.09.2011 under section 26(2) of the Act in respect of the above information and I am in overall agreement with the reasoning given and conclusion drawn therein that *"there does not exist a prima facie case in the matter for making a reference to the Director General for conducting investigation into this matter and accordingly, the proceedings related to this matter are closed forthwith under section 26(2) of the Act."*



4. However, with specific regard to the observation in the above mentioned order of the Commission at para 5, I hold a different view according to which OP 2, the High Court of Uttarakhand is not an "enterprise" within the definition of "enterprise" given in section 2(h) of the Act in the facts and circumstances of the instant case.

5. It is pertinent to reproduce here in entirety the aforesaid para of Commission's order dated 30.09.2011:

"It is noted that the activities being performed by OP1 and OP3 are covered in the definition of 'enterprise' under section 2(h) of the Act. Similarly, the activity performed by OP2 i.e. the High Court of Uttarakhand in inviting tenders being purely administrative/executive in nature and thus while carrying out such activities, OP2 is also covered within the definition of an 'enterprise' under section 2(h) of the Act."

6. Before proceeding further, it is pertinent to recall the preamble of the Competition Act, 2002 which states the philosophy of the Act:

"An Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission 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."

It is also appropriate to quote section 2(h) of the Act:

"enterprise" means a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relating to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.

Explanation.—For the purposes of this clause,—

(a) "activity" includes profession or occupation;

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

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

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

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

7. The Competition Act, 2002 is an economic law which seeks to promote and protect competitive forces in the market because free and fair competition is in the interest of consumers. Although the word "competition" is not defined anywhere in the Act, in economics it is a term that encompasses the notion of individuals and firms striving for a greater share of a market to sell or buy goods and services and earn higher profits as a consequence. Merriam-Webster defines competition in market as "*the effort of two or more parties acting independently to secure the business of a third party by offering the most favorable terms.*" Competition was described by Adam Smith in *The Wealth of Nations* (1776) and by later economists as a mechanism for allocating productive resources to their most highly-valued uses and for encouraging efficiency. Later microeconomic theory distinguished between perfect competition and imperfect competition, concluding that no system of resource allocation is more Pareto efficient than perfect competition. Competition, according to the theory, causes commercial firms to develop new products, services and technologies, which would give consumers greater selection and better products. The greater selection typically causes lower prices for the products, compared to what the price would be if there was no competition (monopoly) or little competition (oligopoly, duopoly, collusion, cartelization or similar other market structure). Thus, in essence, microeconomic theory concludes that competition results in greater consumer welfare and at the same time it enhances producers' efficiencies. The preamble of the Act as well as the definition of "enterprise" should be read in the context of this economic thought.

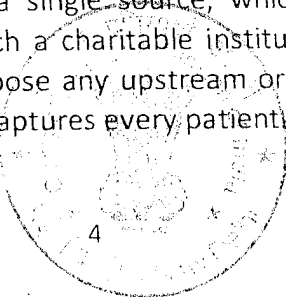
8. The phrase "*engaged in any activity*" used in section 2(h) is of utmost importance and must be interpreted in consonance with the above economic thought as well as the intent of the preamble to the Act. Competition or lack of it does not happen in a vacuum but in the necessary backdrop of some *market* for some good or service that consumers are demanding for a certain price, which is normally ascertained by the interplay between the elemental forces of demand and supply. Thus, only if any person (whether individual or artificial juridical person such as a company, government department, charitable trust or court) is engaged in *production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind ...* can such person be considered as an enterprise in an economic sense and it is only such an economic enterprise that is the intended subject matter of sections 3 or 4 the Act. If it is not an economic enterprise, such a person would neither think nor conduct itself as a "firm" in microeconomic theory nor would its conduct intend to achieve the same goals as a "firm", namely greater share of market or higher profits. Since neither the conduct nor the intent of such person is market oriented, no market principles can be applied to their behaviour – except, perhaps when the person is in capacity of a consumer. As a corollary, no tool of market regulation would work effectively on non-market entities or to solve non-market problems.

9. The word "activity" in the context of section 2(h) has been defined as "*activity*" includes *profession or occupation*. Although this is an inclusive definition, the words "profession" and "occupation" clearly indicate requirement of regularity and continuity over a period of time. They also indicate correlation of the activity with an avenue of earning or profit *in a market*. The sale of a second hand car by an individual

or even a business firm does not qualify that individual or firm as being *engaged in* the “*occupation*” of “second hand car sales” unless the activity is done regularly, over a reasonable period of time *and* with the intention of making earnings or profit from the activity. Similarly, a person may design his or her own house but it would not qualify the person as being in the “*profession*” of architectural designing. Therefore, “*activity*” in section 2(h) must be relatable to regularity, continuity and economic motive of earning or profit in a market. In fact, the phrase “*engaged in*” denotes these underlying concepts. Only if a person is doing some activity of, say, provision of portfolio management services regularly, continuously and for some commercial or business consideration can the person be said to be *engaged in the activity related to* provision of portfolio management service. A sporadic act of giving portfolio advise to a friend or relative, once in a while, without any remuneration would not render such person as someone “*engaged in*” portfolio management service in the context of section 2(h) of the Act. Conversely, a *professional* portfolio manager may also sell a second hand car or buy a luxury apartment. Again, this person cannot be said to be “*engaged in*” the activity related to “*supply*” of second hand cars or “*acquisition*” of luxury apartments in the context of section 2(h) of the Act. His conduct would not emanate from a desire of capturing market of luxury apartments or of second hand cars with a view to increase his profits in those markets. At the same time, if his conduct as a *professional* portfolio manager were to be examined, it would reveal all patterns of behaviour expected of a “*firm*” of microeconomics theory. Therefore, in every case, it is most important to first ascertain whether the person whose conduct is under question is an “*enterprise*” under section 2(h).

10. It is indeed possible for an entity to be engaged in multifarious activities, some of which are economic and some non-economic. For example, a commercial steel making company may run a nursing home for its factory workers. However, it will be noticed that when it comes to the activity of running the nursing home, the company would not behave in a manner that a commercial nursing home would. It may treat its factory workers for free or at a heavily subsidized rate. It would have no interest in forming a cartel with other nursing homes to fix higher fees. It would also not be interested in restraining the workers from going to some other hospital at his or her own expense in order to beat competition especially when reduced burden of treating one less patient for free would reduce its per head expenditure. It would be so because running a nursing home is not an *economic activity* for the steel company and therefore, in that market it will not behave like an “*enterprise*”. None of its acts in connection with the nursing home would be with a view to foreclose competition, create entry barriers, hamper scientific or technological development or to harm “*consumers*” in the nursing home services market simply because the steel company would have nothing to gain if all other nursing homes were to shut down.

11. Conversely, there could be some non-commercial entity such as a charitable trust which is engaged in providing, say, vaccination services for free. It could be procuring all its vaccines from a single source, which is willing to donate to the organization. The decision of such a charitable institution to accept what is offered would not be with a view to impose any upstream or downstream restraint or even acquire market power so that it captures every patient. To dub such an organization as



an “enterprise” under section 2(h), “engaged in” the activity related to “acquisition” of vaccines would be futile from competition perspective.

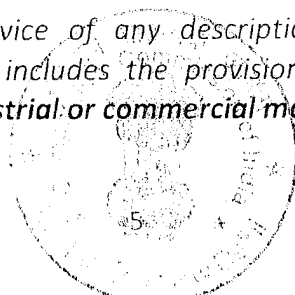
12. If the above logic is not applied to evaluate whether or not the entity under consideration is an “enterprise”, it would run a risk of evaluating the Parliament as an “enterprise” “engaged in” the activity of auction-sale of used furniture simply because it may occasionally auction off worn out furniture. Non-application of the above logic might also render, in some case, the Supreme Court as an “enterprise” “engaged in” sale of waste paper if the Hon’ble Court sells its waste paper at some price.

13. A question may arise whether the evaluation of a person (including any artificial juridical person) as an “enterprise” ought to be *institutional* or *activity based*. In other words, if a *non-economic* person is buying or selling an article or good or is providing some service without an economic objective akin to an economic firm, should its activity of sale or purchase qualify the person as “enterprise”? Alternatively, should the activity of purchase or sale alone be looked at, devoid of any relation of such sale or purchase with the basic purpose or activity of the person? To decide this, what is important in every case is to examine whether the “activity” under consideration is being done with an economic purpose and whether such activity of purchase, storage, supply etc. or provision of service or any of the activities mentioned in section 2(h) is being undertaken in pursuit of some economic objective or not. Such “activity” alone should qualify the entity as an “enterprise” under section 2(h).

14. In the instant case, in view of the above discussion, the status of the High Court of Uttarakhand has to be first examined. It may be noted that the High Court of Uttarakhand cannot be said to be 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 ...*

15. In the instant case, the High Court is purchasing the service of digitization of its record with a view of streamlining its own functioning and improving delivery of justice. The High Court of Uttarakhand cannot be said to be “engaged in the activity” of purchase of record digitization services. It is not required here to go into Articles 214 – 237 of the Constitution of India to understand what is a High Court supposed to be “engaged in”. Suffice to say that a High Court is engaged in administration of justice. However, like any person (including any artificial juridical person), it would also be buying many things – in this case, record digitization service. This not only renders it as a “consumer” as per section 2(f) of the Act but, in view of the discussions above, the activity is not being undertaken with a view to further produce and sell some article or good or provide some “service” as defined under section 2(u), which defines “service” as

“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.....



Unarguably, administration of justice is not something that is done *in connection with business of any industrial or commercial matters*.

16. If the Uttarakhand High Court is purchasing some service in pursuit of some administrative or executive goals such as efficiency, it does not mean that such input is being used by it to further produce some economic good or service, which is subject to economic laws of demand, supply and price setting or to any market in India. To classify the Uttarakhand High Court as an “*enterprise*” within the meaning of section 2(h) merely because it is purchasing some service for its own use would be an erroneous interpretation of the section and would not fit in with the concept of “*competition*” in economic thought.

17. In absence of relevant jurisprudence in context of the Competition Act, 2002 in India, it may be useful to look at how European Union Competition authorities evaluate persons as “*undertaking*”, which is a term used in place of “*enterprise*” in the parlance of EU competition law jurisprudence. Some of the relevant ratios from EU jurisdiction are reproduced below:

Requirement of economic activity

“...in Community competition law the definition of an ‘undertaking’ covers any entity engaged in an economic activity, regardless of the legal status of that entity and the way in which it is financed.” [ECJ, C-205/03 P – FENIN, 11 July 2006, para. 25.]

Exercise of powers of public authority

*“According to the case-law of the Court, the Treaty rules on competition do **not** apply to activity which ... is connected with the **exercise of the powers of a public authority.**”* [ECJ, C-309/99 – Wouters, 19. Feb 2002, para. 57]

Necessity of operating in a “market”

*“In this connection, it is the activity consisting in **offering goods and services on a given market** that is the characteristic feature of an economic activity”* [CFI, T-319/99 - FENIN, 4 Mar 2003, para. 35]

Nature of subsequent use in procurement

*“...The nature of the purchasing activity must ... be determined according to whether or not the **subsequent use** of the purchased goods amounts to an economic activity.”* [CFI, T-155/04 – SELEX, 12. Dec 2006, para.65]

18. 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. Even applying the above principles to the instant case, the High Court of Uttarakhand cannot be determined as "enterprise" under section 2(h) of the Act.

19. This supplementary order is being written with the hope of developing clearer interpretation of section 2(h) that would, in future, help bring sharper focus on competition issues arising in markets in India.

20. In view of the reasons given above, I concur with the decision of the Commission in the instant case conveyed vide order dated 30.09.2011 that there does not exist a *prima facie* case in the matter for making a reference to the Director General. However, I am of the considered view that in the facts of the instant case High Court of Uttarakhand, OP 2 is not an "enterprise" within the parameters of section 2(h) of the Competition Act, 2002.

Sd/-
Member (T)

