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Abdullah Hussain
Luthra & Luthra Law Offices

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Defining "Enterprises" Poses a Jurisdictional Challenge

Abdullah Hussain[1]

I. INTRODUCTION

The High Court in Delhi is currently inundated with petitions questioning not only the jurisdiction of the Competition Commission of India ("CCI/Commission") to adjudicate on issues ranging from intellectual property rights enforcement, to overlapping jurisdiction with sectoral regulators, to the validity of the first dawn raid conducted by the Director General's office, but also to adjudicate on the constitutional validity of the Competition Act, 2002 (Act) itself. Add to that the recent uptick in M&A transactions involving multi-billion dollars deals leading to the first 'phase II' inquiries by the CCI resulting in divestments, and it would be safe to say that the last 12 months have been very busy for the Indian competition law space.

In all the hullabaloo, there have been a few small but significant decisions passed by the Commission regarding the scope and determination of what constitutes an "enterprise" so as to fall under the Commission's jurisdiction. These decisions have been especially relevant in cases concerning government entities. The government, be it union or state, remains India's largest litigator, and several cases involving the government, through various instrumentalities, have found their way to the Commission. Many of them have been dismissed on the ground that the entity complained against did not fall under the purview of the term "enterprise." However, little attention has been paid to these decisions.

II. DETERMINING WHAT CONSTITUTES AN "ENTERPRISE"

Section 2 (h) of the Act provides that an "enterprise" includes any entity (including a department of the Government) that is engaged in any activity relating to the production, storage, supply, distribution, acquisition, or control of articles or goods, or the provision of services. But this 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, defense, and space.

The first step in the determination of what constitutes an "enterprise" thus involves an examination of whether the entity is engaged in one of the listed activities, while the second step exempts such activities if they are relatable to the sovereign functions of the state. Both steps involve determinations to be made—first, what it means to be engaged in an activity and second, in cases involving government entities, what activities are relatable to sovereign functions of the state. At times, however, the two are muddled into one.

In an early decision relating to the Department of Telecommunications[2] (relating to discriminatory licenses), the Department took the plea that the licenses it granted to telecom

[1]Partner in the New Delhi office of Luthra & Luthra Law Offices.

[2] *Internet Service Providers Association vs. Department of Telecommunication*, Order dated 29.06.2010 in Case No. 10/2009.

operators and internet service providers were in discharge of its sovereign functions, and hence did not fall under the meaning of the term "enterprise." Although the complaint was dismissed, the Commission gave no definitive finding on this point. It appears from the order, however, that the Commission found that there was no discrimination on facts, suggesting that the Department indeed constituted an enterprise; however, it had not abused its position.

In *Jindal Steel and Power Ltd. vs. SAIL*,[3] the analysis was better articulated. In determining whether the Indian Railways would fall within the term's ambit (given that in India the national railways is a monopoly and undertaken solely by the Government), the CCI considered the fact that Indian Railways was a department of the Ministry of Railways, which was specifically engaged in the provision of railway services, and therefore was engaged in an economic activity. The procurement of steel rails was therefore not relatable to sovereign functions of the state.

Although the question relating to the department was thus settled, the Ministry of Railways found itself to be the subject of inquiry in a subsequent case pertaining to discriminatory rate structures for haulage and land leased to container train operators, resulting in favorable treatment to its own public sector company. The Ministry raised the plea of sovereignty. The CCI however held that the exemption was unavailable as the issuance of rate circulars was a commercial activity and not a sovereign function.[4] The matter found its way to the High Court, which held that the activity itself was of a commercial nature, and could be performed by entities other than the state.[5] Implicit in these decisions is a finding that the Ministry is in fact engaging in an economic activity, presumably through the public sector companies that operate under its purview.

Similarly, in *Surinder Singh Barmi* vs. *BCCI*,[6] the CCI again focused on the nature of the activity in question (organization of a cricket league and sale of various rights associated with it viz. franchise rights, media rights, and other sponsorship rights) rather than the nature of the body performing the activity. The Board for Cricket Control in India ("BCCI") was held to be an enterprise despite its institutional form or the fact that it was a "not for profit" organization. The CCI noted that the BCCI performs two types of roles—as a custodian and as an organizer. While its role as a custodian may not include economic activities, its role as an organizer was not demonstrably outside the scope of economic activity.[7]

III. BROADLY INTERPRETING ECONOMIC ACTIVITY BUT NARROWLY INTERPRETING SOVEREIGN EXEMPTION

These decisions show that the Commission has been interpreting the scope of what it means to be engaged in an economic activity broadly, while interpreting the scope of the sovereignty exemption narrowly. The Commission, however, appears to have become a tad over-

[3] Order dated 20.12.2011 in Case No. 11 of 2009.

[4] Arshiya Rail Infrastructure Ltd. vs Ministry of Railway & Ors., Order dated 14.08.2012 in 64/2010, 12/2011 & 02/2011.

[5] Union of India vs. CCI and Ors., AIR 2012 Del 66.

[6] Order dated 08.02.2013 in Case No. 61 of 2010.

[7] These activities included sale of tickets, grant of media rights, and other revenue generating activities. However, this rationale does pose dangers. Revenue generation may not by itself be an accurate indicator of the nature of the activity.

zealous in this regard. In a complaint against the Department of Industrial Policy and Promotion ("DIPP"), regarding the policy to allow 49 percent foreign investment in the aviation sector in India, the Commission perplexingly came to the conclusion that the DIPP also constituted an enterprise in exercise of issuing this policy, which was subsequently implemented via amendments to the regulations governing investments issued by the Reserve Bank of India.[8] In an expansive statement, the Commission held that "A department of the government can be classified as an enterprise if the functions discharged by it amounts to 'control of articles or goods, or the provision of services'."[9]

Taken at face value, this statement could include every single one of the government's functions as they would all inevitably in some way control the supply of goods or services. If obtaining a license to sell tickets amounts to an economic activity[10] so would the requirement of getting a license to set up a store, employment related licenses and compliances, as well as health and safety clearances. Clearly, however, a strong argument may be made that the requirement of obtaining environmental clearance for a stipulated fee should not lead to the conclusion that the Pollution Control Board is an "enterprise" in so far as that clearance requirement is concerned. The DIPP could not be said to be engaged in an economic activity, nor the sovereignty exemption unavailable, with respect to a decision relating to foreign investment caps in a sector.

The Commission appears to have realized the expansiveness of the "control of goods or services" approach. In subsequent orders relating to the Director General of Health Services,[11] the Insurance Regulatory and Development Authority,[12] and the Commercial Taxes Department,[13] the Commission concluded that the said bodies did not constitute "enterprises," as they related to the body's regulatory functions rather than to any economic activity. In doing so the Commission again reverted to the "nature of the activity" test.

IV. APPLYING THE "NATURE OF THE ACTIVITY" TEST

However, the "nature of the activity" test too cannot be applied in a blanket fashion. In *DGHS,*[14] for example, the Commission made some broad comments focusing on the institutional make-up and the purpose for which it was established, rather than the particular activity in

[8] Shubham Srivastava vs DIPP, Ministry of Commerce & Industry., Order dated 08.10.2013 in Case No. 39/2013.

[9] *Id.* ¶9. The Commission relied on its earlier order dated 30.11.2011 in *Debapriyo Bhattacharya v. The Principle Secretary & Anr.*, Case No. 54 of 2011, where it held that the Secretary of the Home Department was covered within the definition of "enterprise" since the activity of granting licenses for e-ticketing for cinemas amounted to a "control over the provision of services." The order in the DIPP matter was not passed without resistance. In a dissent, one member was of the opinion that the issuance of FDI policies by DIPP could not be interpreted as an economic or commercial activity, and was a sovereign function that could not be delegated to any private entity.

[10] *Debapriyo Bhattacharya, id.*

[11] *Biswanath Prasad Singh* vs. *Director General of Health Services, Ministry of Health and Family Welfare & Ors.*, Case 20/2014, Order under Section 26(2), Order dated 23.06.2014.

[12] *Shri Dilip Modwil* vs. *IRDA*, Case No. 39 of 2014, Order dated 12.09.2014.

[13] *Red Giant Movies v. Secretary, Government Commercial Taxes & Registration Department, G.O. Tamil Nadu & Ors.*, Case 54/2014, Order dated 29.10.2014.

[14] *Supra,* note 11.

question.[15] Similarly, in *Rajat Verma vs. PWD, Haryana*,[16] the Commission focused on the overall nature and purpose for which the Public Works Department ("PWD") was established rather than the particular activity in question.[17] Such observations may lead to all functions performed by such bodies being exempt from the application of the Act.

Focusing on the nature of the body and its purpose is not the appropriate test, save as to supplement the determination of the nature of the activity in question where ambiguity may arise. As the Commission itself held in the *BCCI* case, the same entity could perform different functions—some relatable to economic activities while others not. In *PWD*, the Commission may have mixed the determination of whether the activity is an economic one with the determination of whether the activity may relate to a sovereign function.

In a recent order of February 2015, the Commission had occasion to discuss the definition of an enterprise in a matter that concerned a non-government entity, namely a truckers co-operative society.[18] Associations are normally excluded from the purview of the definition as they do not engage in any economic activity of their own, but only act as the industry's voice and interface with the government. In this particular case, however, the Commission found that the association was conducting a service on behalf of its members and being paid a commission. On this basis, the association was also held to be engaged in an economic activity and thereby constituted an enterprise.

Had a similar approach been applied in *PWD*,[19] the outcome may have been different. In floating tenders to procure the service of construction of certain roads the PWD was engaging in an economic activity regardless of the fact that it may not have been charging customers for the use of the road. In a strong dissenting note in that matter, one member did in fact remind the Commission of the need to strictly limit the application of the sovereignty exemption. Activities such as the procurements of road construction services cannot be said to satisfy the sovereignty requirement.

[15] For example at ¶9 the Commission states that the National Accreditation Board for Hospitals and Healthcare Providers "is a constituent board of the Quality Council of India, set up to establish and operate accreditation programmes for healthcare organizations. It has been established with the objective of enhancing health system & promoting continuous quality improvement and patient safety. The activities performed by the above said entities cannot be covered under the definition of enterprises in terms of Section 2(h) of the Act as they are not engaged in any commercial or economic activities."

[16] Order dated 12.01.2015 in Case No. 70 of 2014.

[17] At ¶8, the Commission holds that "The activities being performed by the Opposite Party No. 1 cannot be covered in the definition of 'enterprise' because it is not directly engaged in any economic and commercial activities. The role of the Opposite Party No. 1 is limited to provide infrastructural facilities to the people without any commercial consideration."

[18] *Shivam Enterprises v. Kiratpur Sahib Truck Operators Co-operative Transport Society Limited*, Order dated 04.02.2015 in Case No. 43 of 2013

[19] *Supra*, note 17.