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Analysing developments impacting business

COMPETITION COMMISSION OF INDIA EXONERATES GAIL (INDIA) LIMITED FROM ALLEGATIONS OF ABUSE OF DOMINANCE

19 November 2018

On 8 November 2018, the Competition Commission of India (Commission) passed a common order (Order) to dispose of 10 sets of information (Information) filed against GAIL (India) Limited (Gail) by some of its Regasified Liquefied Natural Gas customers (Informants). The Commission found that Gail did not abuse its position of dominance in terms of Section 4 of the Competition Act, 2002 (Competition Act). Broadly, the allegations pertained to: (i) the terms of the Long-Term Gas Supply Agreement (GSA) between Gail and the Informants; and (ii) the manner in which Gail performed its obligations under the GSA.

Long-term contracts may not foreclose markets

The Information, *inter alia*, averred that the GSA was a standard contract whose minimum duration was 20 years. Such duration was alleged to have resulted in foreclosure of the market for "supply and distribution of natural gas to industrial consumers". The Commission held that projects in the energy sector were characterised by significant and continuous up-front investments made by sellers of energy and, therefore, the duration of the GSA was justified to guarantee sellers a steady stream of revenue and render operations viable. The Commission also observed that existence of such GSAs did not result in the denial of market access to new entrants and/ or competing enterprises, as there was evidence to suggest that competitors of Gail (such as, Indian Oil Corporation Limited and Bharat Petroleum Corporation Limited) had entered the market during the subsistence of the GSA and were presently active. Notwithstanding the justifiability of the long duration of the GSA in this case, the Commission also observed that Gail did offer short-term contracts to its customers and, therefore, there was no foreclosure of market by Gail in contravention of Section 4 of the Competition Act.

A contractual non-compliance which does not prejudice competition is not abuse

The Commission also assessed the manner in which Gail imposed the 'Take or Pay' liability on the Informants. 'Take or Pay' liability is an obligation on the buyer to pay for the quantities of gas not taken but agreed to be taken. It was the Informants' allegation that Gail failed to make certain "nominations" under the GSA, which made it impossible for the Informants to calculate their 'Take or Pay' liability. The Commission held that when determining abuse arising out of a contract, the conduct of both parties is relevant for examination. Accordingly, the Commission analysed: (i) the degree of adherence to the terms of the GSA by the Informant; and (ii) the extent of acquiescence of the Informant. The investigation ordered by the Commission found that neither Gail nor the Informants had strictly adhered to their obligations to make "nominations" and

also that the Informants had never raised objections in this regard. Objections were raised by the Informants only when the 'Take or Pay' liability was imposed on them. The Commission also took into account the fact that Gail had imposed only a fraction of the 'Take or Pay' liability in order to mitigate the losses it suffered because of less drawl of gas by the Informants. In view of the above, the Commission did not find any violation of the Competition Act due to imposition of 'Take or Pay' liability.

The Informants' allegation that gas supply was suspended by Gail without prior notice was found to be unsubstantiated and their grievance that the letter of credit and the invoices were not as per the terms of the GSA was found to be a mere technical non-compliance that did not prejudice the customer or impede competition in the delineated markets. The Commission observed that mere technical and contractual non-compliances which do not prejudice the aggrieved party cannot be held as abuse of dominant position. The Commission, however, directed Gail to make necessary rectifications/modifications in formats within 90 days of receipt of the order.

Comments

The Order provides valuable guidance as to what may constitute abuse of a dominant position under the Competition Act in relation to operation of bilateral contracts with dominant enterprises. The Commission has clarified that where a party has consciously negotiated and entered into an agreement with a dominant enterprise then it is not appropriate to impugn such agreements unless it is evident that the aggrieved party has been considerably prejudiced and competition in the market has been impeded. Minor contractual errors which do not cause considerable prejudice may not constitute an abuse of dominant position.

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