

JUST IN

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JUST IN - COMPETITION COMMISSION UPDATE

AGREEMENT BETWEEN FLAT PURCHASER AND BUILDER UNDER CCI SCANNER

Anti competitive practices specially in a developing country and an egalitarian society such as India create economic disadvantage and social loss. The Competition Act, 2002 (**'the Act'**) in India was enacted to ensure fair and healthy competition in India by prohibiting trade practices, which cause adverse effect on competition. The duty of Competition Commission of India (**'CCI'**) is not only to undertake competition advocacy and impart training on competition issues but also eliminate practices that have an adverse effect on competition in India. The remedy under this Act is in addition to and not derogation of the provisions of any other law for the time being in force.

Recently, CCI passed an Order dated 12 August 2011 in a case filed by Belaire Owners Association, an association formed by the apartment allottees of a building complex known as 'Belaire' situated in DLF City, Phase V, Gurgaon, Haryana against DLF Limited (**'DLF'**); wherein CCI imposed a heavy penalty of Rs. 630 crores (equivalent to USD 136.8 million approx) on DLF on the ground of abuse of dominant position and creating an adverse affect on competition. The apartment allottees in this case had alleged that unfair terms and conditions were meted out by DLF in the Agreement entered into between DLF and apartment allottees, which amounts to abuse of dominant position by DLF.

Here's a brief analysis on the issues before the CCI and its findings on the same.

Jurisdiction of CCI:

The scope of jurisdiction of CCI in this case was questioned by DLF. Section 4 of the Act prohibits the abuse of dominant position by an enterprise. Under the Act, dominant position of an enterprise is abused when such enterprise directly or indirectly imposes unfair or discriminatory conditions in the purchase or sale of goods or services or price in purchase or sale of goods or services. It was DLF's contention that 'sale of an apartment' can not be termed as 'sale of goods or services'.

Relying upon the definitions of 'service' as provided under the repealed Monopolies & Restrictive Trade Practices Act, 1969 ('MRTP Act'), Consumer Protection Act, 1986 and Finance Act, 2010 (in the context of service for levy of

'service' tax) and a catena of judgments passed by the Hon'ble Supreme Court, CCI held that dealings in real estate or housing construction has always been included within the definition of 'service' whether it be the repealed MRTTP Act or Consumer Protection Act, 1986 or Finance Act, 2010.

In this regard, the CCI also relied upon ***Lucknow Development Authority vs. M.K. Gupta*** where the Hon'ble Supreme Court held that "*construction of a house or flat is for the benefit of person for whom it is constructed. He may do it himself or hire services of a builder or contractor. The latter being for consideration is 'service' as defined in the Consumer Protection Act, 1986...any defect in construction activity would be denial of comfort and service to a consumer. When possession of property is not delivered within stipulated period the delay so caused is denial of service. Such dispute or claims are not in respect of immoveable property as argued but deficiency in rendering service of particular standard, quality or grade.*"

The CCI made an observation that the definitions of 'service' and 'consumer' as provided in the Act are wider than the definition of these terms in the Consumer Protection Act, 1986. A plain reading of the definition of 'service' under the Act makes it amply clear that the real estate activities squarely fall within the ambit of the definition of 'service'. Under the Act, 'service' includes provision of services in connection with business of any industrial or commercial matters such as real estate, banking, insurance etc.

Concluded:

The contention that 'sale of apartment' is not covered under the definition of 'service' was held to be wholly misplaced and devoid of any substance.

Retrospective effect of the Act:

DLF contended that the Agreements with the apartment allottees were executed in December 2006 - 07 while Section 4 of the Act came into force only after 20 May 2009. DLF urged that there was no legally recognized concept of an enterprise having a dominant position prior to 20 May 2009; hence the question of contravention of Section 4 does not arise.

CCI observed that all acts done in pursuance to any agreement, which is executed before Section 4 of the Act came into force, can not be examined after the date of enforcement. However, if any enterprise invokes the provisions of such agreement after the date of enforcement and that action is now prohibited by the Act, in such case the action could be seen through the lens of the Act.

CCI relied on the judgment of ***Kingfisher Airlines Ltd. & Anr. Vs. CCI & Ors.***, passed by the Hon'ble Bombay High Court, which lays down the following:

"The question here is whether any agreement, which was valid until coming into force of the Act, would continue to be so valid even after the operation of the law. We would say that the Act could have been treated as operating retrospectively, had the Act rendered the agreement void ab initio and would render anything done pursuant to it as invalid. The Act does not say so. It is because the parties still want to act upon the agreement even after coming into force of the Act that difficulty arises. If the law cannot be applied to the existing agreement, the very purpose of the implementation of the public policy would be defeated. Any and every person may set up an agreement said to be entered into prior to the

coming into force of the Act and claim immunity from the application of the Act, such thing would be absurd, illogical and illegal. The moment the Act comes into force, it brings into its sweep all existing agreements."

Concluded:

The contention of DLF that as the Agreements were executed before Section 4 of the Act came into force, provisions of the Act were not attracted was held to have no merit and was rejected.

Assessment of Dominance:

Section 4 of the Act provides that no enterprise or group shall abuse its dominant position in the relevant market. The 'relevant market' in this case was determined by the CCI to be the market for services of developer/ builder in respect of high-end residential accommodation in Gurgaon. It was DLF's contention that it does not enjoy a dominant position in the relevant market as there are many large real estate companies and builders in India, particularly in Northern India who offer stiff competition in the relevant market of residential apartments and give a wide choice to the consumers.

The Act explains the term 'dominant position' to be a 'position of strength' that enables an enterprise to '*operate independently of competitive forces prevailing in the relevant market*' or to '*affect its competitors or consumers or the relevant market in its favour.*' The determination of dominant position of an enterprise in the relevant market is dependant upon a spectrum of factors such as the market share of the enterprise, size and resources of the enterprise, size and importance of the competitors, economic power of the enterprise including commercial advantage over competitors, market structure and size of market etc. Upon examining a wide array of factors, the CCI observed that DLF and its subsidiaries have a considerable higher position of strength in the relevant market in comparison with its competitors. It was observed that by virtue of the historical presence of DLF in the market, its presence in non residential segment of real estate, its financial strength etc., DLF was way ahead of its competitors in terms of its ability to operate independently of competitive forces or affect its competitors or consumers or relevant market in its favour.

Concluded:

CCI held that DLF is in a dominant position in the relevant market as provided under the Act.

Concept of 'aftermarket abuse' for assessing dominance of the builders:

The CCI relied on the concept of 'aftermarket abuse' as explained by the U.S Supreme Court in the case of ***Eastman Kodak Co. vs. Image Tech (SVCS504 U.S 451 (1992))***. According to CCI there exist two markets in this case. The first market is where a consumer enters into an agreement with builder and the second market is the 'aftermarket', i.e. after he has entered into an agreement with the builder and is governed by the agreement, which he has entered into with the builder. It was held by CCI that by virtue of the agreement the builder acquires a dominant position over the consumer. In this case, CCI was of the view that as there existed high switching costs and information asymmetry in the aftermarket, the abuse of dominance was established.

Concluded:

The Agreements entered into between DLF and apartment allottees are between big economic players and small time buyers. Substantial sums of money were paid by the apartment allottees to DLF upon signing the Agreements. If an allottee wanted to shift to another builder, he would have lost substantial amount of money. Thus, there existed high shifting costs and information asymmetry.

It was held that in such a scenario, a new builder in the market would get no buyer even if the builder offered innovative and better products. Thus, the high switching costs forecloses the market for the new builder.

Hence, It was held by CCI that the abuse of dominant position by DLF due to unfair conditions in the Agreements creates an adverse effect on competition in India.

Abuse of Dominant position:

The key issue before the CCI was whether DLF has abused its dominant position in the relevant market. To determine this issue the Agreement entered into between DLF and the apartment allottee was examined in detail. CCI's findings on the same reveal that the nature of clauses in the Agreement was blatantly unfair, heavily biased in favour of DLF and even exploitative. According to CCI's findings, here are some of clauses that amount to abuse of dominant position by DLF:

Additions/ Alterations in plans, layout:

Ø Unilateral right to change the plan/ layout without consent of the allottee's.

Ø Unilateral right to increase/ decrease super area at its sole discretion without consulting allottee's who nevertheless are bound to pay additional amount or accept reduction in area.

Ø Thus, it was observed that a person seeking allotment is not aware as to what kind of structure is finally constructed on the site.

Ø Further, right given to DLF to make additions to or put up additional structures in/ upon the building and the land beneath the building and such additional structures shall be the sole property of DLF with a right to dispose of the same.

Delivery of possession:

Ø No firm commitment for handing over possession of apartment to apartment allottee as the clause pertaining to delivery only mentions "*DLF contemplates to complete construction of the building within a period of 3 years from the date of execution of Agreement*".

Ø The term 'contemplates' was considered to have a very wide scope for deliveries.

Failure to deliver possession within time prescribed:

Ø In the event, there is a delay in delivering possession, the liability of DLF is limited to payment of compensation @ Rs. 5 per sq. ft of the super area per month for the period of delay beyond three years.

Ø CCI observed that DLF had covered itself on many accounts to save itself from any liability that may arise in case of delay on delivery.

Heavy exit option for apartment allottee:

Ø No exit option available to allottee's except when there is a failure to deliver possession within the time prescribed, but even in that event allottee gets his money refunded without interest only after sale of the apartment by DLF to someone else.

Ø According to the CCI, the Agreement also provides for arbitrary forfeiture of amount in the event of failure on the part of apartment allottee to perform his/ her obligations.

Punitive penalty imposed on apartment allottee:

Ø The interest chargeable to the allottee's in case of delay in making payments to DLF was much more than delay on account of construction and handing over possession of apartment to the allottees.

Information asymmetry:

Ø CCI has observed that the consumers are not made known the final carpet area, built up area and super area of the apartment units and final price which the allottee is expected to pay which gives rise to information asymmetry.

These were the broad premises on basis of which CCI concluded that DLF has abused its dominant position by imposing unfair conditions on the sale of its services to consumers.

The CCI was of the view that it is required to adopt a deterrent approach so that recurrence of such conduct is stopped and hence, it levied a heavy penalty of Rs. 630 crores (7% of the average turnover of the past 3 years) on DLF.

While this is a précis of the main points in the judgment, we intend to bring out a further update on this with our comments and critical analysis for our clients.

Editor: Mirat Patel

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