



Monthly Newsletter

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CCI Investigation into the Gas Sale Agreement (GSA) of GAIL

In a bunch of informations filed, from case number 16 of 2016 to case number 20 of 2016, before the Competition Commission of India (CCI), relating to the supply of Re-gasified Liquefied Natural Gas (“RLNG”) to various users of RLNG, anti competitive conduct in by GAIL has been alleged.

In these cases, the allegations of anti competitive conducts were brought against GAIL by the Informants. These related to the allegations regarding unequal terms, in the agreement, against the buyers of RLNG. In the agreement for supply of gas, there were many clauses which stipulated a penalty/obligation on the buyers but no matching reciprocal obligations on the sellers and this has been alleged to be a case of abuse of dominant position. The allegations pertained to a number of clauses in the Gas Supply Agreement(GSA). These have been identified as the clauses relating to “Make Good Gas”, “Restoration Quantity”, “Recovery Period Gas”, “Quality”, “Take or Pay Obligation and Liability of the Opposite Party to pay liquidated damages”, “Force Majeure” and “Suspension and Termination”.

In most of these clauses, there is an obligation on the buyer of a gas with no corresponding obligation on the sellers. As an example, under the make “good gas” clause, the quantum of gas which is not being taken by the buyers pursuant to downward flexibility quantity mechanism (a mechanism to request a lower quantity of a gas temporarily) could be requested by the buyer as “make good gas” at a later point of time during the tenure of GSA. GSA stipulates that if a buyer does not take “make good gas” till the end of the duration of the GSA, the buyer has to pay for the quantity even though the seller utilises the gas elsewhere for other purposes. The case of the Informant was that it is only entitled for a particular quantity of a gas and if it is in need of more gas and GAIL is not able to supply that gas or even if GAIL fails to supply the make good gas, there no liability on GAIL either to pay or to give any compensation. On a similar pattern under the clause of “Restoration Quantity”, if gas not be supplied by GAIL to the buyers for any reason falling within the category of “Force Majeure” events, the buyer has the option to request the delivery of this deficiency (termed as ‘Force Majeure Deficiency (FMD)’) at a later point of time. This quantity is referred to as “Restoration Quantity” in GSA. According to the terms, if the buyer does not take FMD till the termination of GSA, it shall, in any case, be liable to pay for such quantity. Conversely, if GAIL fails to supply the FMD quantity upon request, there is no provision in GSA to deal with such a situation and no consequential penalty on GAIL. Nearly all other clauses which have been alleged to have been violated have similar provisions which, on the face of it, look quite one sided and do not have the appearance of being balanced. The Informants specifically referred to some more conducts which were indulged into by GAIL after May 20, 2009 and are instances of abuses. These are also in the nature of “Forcing Informants” to maintain a letter of credit in a format which enables GAIL to secure payments which are not envisaged in GSA, invocation of letter of credit. In the same manner, there are 10 conducts which have listed by the Informants in which although not contemplated within GSA but opposite party is indulging and causing huge damage to the Informants.

This information, filed on May 27, 2016, was considered by Hon’ble Commission and the order was passed on Oct 03, 2016. The Commission delineated the relevant market as “supply and distribution of natural gas industrial consumers in Rewadi district” in case number 18/2016 and case number 19/2016 and “supply and distribution of natural gas to industrial consumers in Gurgaon district” in cases numbers 16 & 17 of 2016 and case number 20 of 2016. After looking into various factors, the Commission reached the conclusion that GAIL enjoys a dominant position in both delineated relevant markets. After delineation of relevant market and determination of dominant position therein, the Commission considered individual conducts and reached the conclusion that not only prior to May 20, 2009 but also after this date when the enforcement provisions relating to Competition Act were enacted in force, GAIL has been indulging in anti competitive conduct and, therefore, the Commission was of the view that GAIL, prima facie, indulged in conducts which amounts to contravention of the provisions of section 4(2)(a)(i) and 4(2)(b)(i). After reaching this conclusion, the Commission has directed investigation into the matter by the DG u/s 26(1) of the Act.

European Commission(EC) approves Coherent's acquisition of Rofin-Sinar

Coherent, US based global supplier of lasers, successfully acquired the US and German based company, Rofin-Sinar, even in the face of various competition concerns since the proposition would have resulted in the acquisition of over 50% market share. However, the concerns of EC were allayed by Coherent's offer to sell Rofin-Sinar's "Hull (UK)" business which manufactures low power CO2 lasers. Hence, the acquisition was approved subject to commitments. (Source: IP/16/3548)

US Department of Justice and Federal Trade Commission seek public comments vis-a-vis International Antitrust Guidelines

The DOJ and FTC have invited public comments on the proposed revisions to the Antitrust Enforcement Guidelines for International Operations, 1995 which aim at making the guidelines up-to-date and transparent in light of increased globalization, international antitrust enforcement and cooperation. Apart from including updated illustrations on the type of antitrust issues arising most commonly, these revisions also include a chapter on international cooperation between agencies, the application of US antitrust law to foreign commercial conduct, foreign sovereign immunity, Foreign Trade Antitrust Improvements Act, etc. The revised guidelines have been restructured in order to make them more useful and easy to access while focusing on the questions of great significance, these also describe the current practices and how investigation should be conducted. The proposed guidelines highlight the growing need of antitrust enforcement in a global economy and the cooperation between

national competition agencies on both policy and investigative matters. (Source: DoJ Press Release dated 01.11.2016)

US Antitrust regulators release guidance for Human Resource professionals on hiring and compensation practices

The Federal Trade Commission (FTC) and the Department of Justice (DoJ), recognising the need to protect employees from naked wage fixing, no poaching agreements, etc., have issued a joint guidance so that HR Professionals, in charge of such decisions, can follow competitive hiring and compensation practices. The guidance, as per the DoJ's press release, acknowledges that workers are disadvantaged when companies that normally compete with each other agree to not recruit each other's employees or fix wages since it eliminates competition in a way akin to price-fixing or customer allocation. Hence, the DoJ has made clear its intentions to launch criminal investigations into such agreements, the list being non-exhaustive. (Source: DoJ Press Release dated 20.10.2016)

European Commission investigates into the proposed acquisition of Syngenta by ChemChina

In order to assess whether the proposed acquisition of Syngenta, an international giant in seeds and crop protection, by the Chinese company, ChemChina, which controls Adama, the largest supplier of generic crop protection products in Europe, in an industry that is already concentrated, the European Commission has launched an investigation since both companies have overlapping portfolios. The initial investigation by EC has already revealed that, *inter alia*, the combined shares of both companies is



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relatively high in many of these overlapping markets, some of the products being in direct competition with each other. The EC's in-depth investigation will also assess whether the proposed acquisition will adversely affect the supply of active ingredients to both companies. The main concern of EC is, however, that the proposed acquisition could, apart from reducing competition in the market, have an impact on price and choices for farmers.

US District Court charges 6 executives for price fixing conspiracy

The District Court of San Francisco, by way of a federal grand jury, has charged 6 executives and a total of 5 companies for conspiring to fix prices for electrolytic capacitors sold in US and abroad. In the face of a worldwide conspiracy, the Department of Justice has made it clear that it would not hesitate in charging foreign nationals involved in duping American citizens. It is pertinent to note that electrolytic capacitors are necessary components of a plethora of electronic products like computers, televisions, etc. as they store and regulate electrical current. (Source: DoJ Press Release dated 02.11.2016)

Guide to Prepare Against Dawn Raids

A dawn raid is a mechanism of search and seizure; one of the many tools available to the Competition Commission of India (hereinafter as “CCI” or “Commission”) in order to monitor, regulate and combat anti-competitive conduct. Such raids are inherently intrusive in nature and therefore regulators use this mechanism cautiously and only in situations where other regular means are inadequate to discover the evidence in order to establish anticompetitive conduct.

In the case of JCB India Limited, in September 2014, the Director General (“DG”) of the CCI took a new dynamic step in exercising its investigatory powers by conducting its first ever dawn raid. Thus, it becomes imperative for companies to know how to handle a dawn raid if it occurs in their premises with the least possible damage and utmost cooperation. Hence, we enumerate various helping points to get by a dawn raid as follows:

1. The official arrives- The officials arrive with the investigation mandate and ask immediately to meet either a particular named person or the most senior company official on the premise. As ordered by the officials, call the respective person along with the company’s most senior in-house lawyer dealing in competition matters to attend the officials immediately. Make the officials seated in the meeting room with no access to files and IT systems. Try to seek out the contact details of the official in charge and along with it also take three copies of the mandate, one for senior executive, one for in-house lawyer and one for external lawyer.
2. Holding the fort until help arrives- The senior executive /in-house lawyer should read the mandate carefully and check whether the officials are authorised to conduct an investigation. The mandate should apply to your company and the officials should have court warrants for search purpose. In normal circumstances, the investigators tend to wait for reasonable time for external lawyers to arrive in case there is no in-house counsel, however in case it is a criminal investigation, then officials tend to start their investigation immediately.
3. Organising the internal team- An internal team should be organised immediately to assist the officials during the investigation. The team should have a senior member of IT staff, a senior employee to co-ordinate information with the officials and a senior executive who can take decisions on behalf of the company along with the employees to shadow the officials to ensure that the officials are complying within the authority.
4. Internal Communications- In conjunction with the company’s legal dept., an email should be sent to all the on-site employees comprising of the information about the presence of officials along with the restrictions placed on the company by the officials. The email should contain professional and courteous dealing with the officials, instructing them to not to handover any document without obtaining prior consent.

from seniors. Further, destruction or deleting any documents whether in hard or soft copy format should be suspended. Any breach of these requirements could prove to be a criminal offence.

5. External Communications- The Company should never discuss the investigation or even mention that an investigation is underway to any third party, namely the competitors and customers. The company should monitor the website of its main competitor and the official website of the regulatory agency in order to check if they make any public announcement about the investigation. The company should maintain low-key press in case it is needed and an announcement should merely confirm that the investigation is underway and the company is cooperating with the investigators.
6. Arrival of External Lawyer- Ask the lawyer to read the mandate and try to persuade the officials for the delay starting the investigation. Further, nominate a person and the external lawyer who will handle any disagreements with the officials until the company ascertain the scope and nature of the investigation.
7. What power of search do the officials have- In case the officials have a search warrant then they are allowed to search the premises, documents, IT system, briefcases, handbags etc. On the other hand, in case the officials do not have the search warrant then they cannot search the premises; however they are allowed to take photocopies of the documents.
8. What documents can the official read- the officials have authority to read all the documents that comes within the scope of investigation mandate. The officials are , generally, not entitled to read documents that are covered by legal privilege.
9. What type of questions can the official ask? - The investigating officials can generally ask any company employee seeking an explanation of a particular document. Further, they are allowed to ask the whereabouts of a certain documents. However, an investigating official cannot ask a question to which the answer might lead to the self incrimination of the company.
10. How to answer officials' question- The Company should try to direct the question to the designated senior employee. The job of such an employee should be to reply concisely and by not giving false statements or mislead the officials. In case there is a complicated question or self-incriminating question, the company should consult their lawyer first.

The Company should cooperate with the officials and try not to obstruct while they are trying to exercise their legal powers that may lead to criminal offence or may lead to company/individual being fined. Further, any company expecting such raids should put in place dawn raids guidelines and appoint counsel at short notice to ensure proper acquiescence, keeping in mind the companies responsibilities as well as rights.

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