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Info Capsule

REVIEW OF THE FDI POLICY OF FOREIGN INVESTMENT IN STOCK EXCHANGES[1]

- Government of India, Ministry of Commerce & Industry, Department of Industrial Policy & Promotion Vide its Press Note No.1 (2017 Series) dated 20th February, 2016 reviewed FDI Policy on foreign investment in Indian Stock Exchanges and amendment to paragraph 5.2.21 of 'Consolidated FDI Policy Circular of 2016.

- Before the issue of Press Note 1(2017 Series), Investment in Infrastructure companies in Securities Markets, namely, stock exchanges, commodity exchanges, depositories and clearing, corporations, in compliance with SEBI Regulations require to fulfil the following conditions:

  (i) FII/FPI can invest only through purchases in the secondary market.
  (ii) No non-resident investor/entity, including persons acting in concert, will hold more than 5% of the equity in commodity exchanges.
  (iii) Foreign investment in commodity exchanges will be subject to the guidelines of the Central Government/SEBI from time to time.

- **The revised conditions Press Note 1(2017 Series) are as under:**

  (i) Foreign investment, including investment by FPIs, will be subject to the Securities Contracts (Regulation) (Stock Exchanges and Clearing Corporations) Regulations 2012, and Securities and Exchange Board of India (Depositories and Participants) Regulations, 1996 as amended from time to time, and other Guidelines/Regulations issued by the Central Government, SEBI and the Reserve Bank of India from time to time.

  (ii) Words and expressions used herein and not defined in these regulations but defined in the Companies Act, 2013 (18 of 2013) or the Securities Contracts (Regulation) Act, 1956 (42 of 1956) or the Securities and Exchange Board of India Act, 1992 (15 of 1992) or the Depositories Act, 1996 (22 of 1996) or in the concerned Regulations issued by SEBI shall have the same meanings respectively assigned to them in those Acts/ Regulations.

[1] Link to the Press Note No.1 (2017 Series), DIPP: http://dipp.nic.in/English/acts_rules/Press_Notes/pn1_2017.pdf

PAYMENT OF WAGES (AMENDMENT) ACT, 2017

- Payment of Wages (Amendment) Act, 2017received the assent of the President on the 15th February, 2017 and replaced the Payment of Wages Ordinance, 2016 which was promulgated on December 28, 2016.

- Section 6 of the Payment of Wages Act, 1936 provides that all wages shall be paid in current coin or currency notes or in both. However, proviso to said section enables the employer to pay the wages to an employee either by cheque or by crediting the wages in his bank account after obtaining his written authorisation.

- Payment of Wages (Amendment) Act, 2017 now enable the employer to pay the wages to the employed person also by cheque or crediting it to their bank account and also to enable the appropriate Government to specify the industrial or other establishments, by notification in the Official Gazette, which shall pay to every employed person, the wages only by cheque or by crediting in his bank account.

  Section 6 of the Payment of Wages (Amendment) Act, 2017 read as under:

  Section 6.Wages to be paid in current coin or currency notes or by cheque or crediting in bank account.

  All wages shall be paid in current coin or currency notes or by cheque or by crediting the wages in the bank account of the employee:

  Provided that the appropriate Government may, by notification in the Official Gazette, specify the industrial or other establishment, the employer of which shall pay to every person employed in such industrial or other establishment, the wages only by cheque or by crediting the wages in his bank account.

GOODS & SERVICES TAX

- GST Council formally cleared the Compensation Bill in its 10th Meeting in Udaipur on February 18, 2017 wherein the states will be given full compensation for the first five years for any shortfall of revenue from 14% annual growth taking 2015-16 as the base year which will be funded by a fund of cesses.

- The Council also brought legal clarifications on various issues in the central and state GST bills. The three draft bills Central GST (CGST), the state GST (SGST) and the integrated GST (IGST) bills are proposed to be passed in the second half of the budget session of the Parliament commencing on March 9, 2017 which will be crucial for the rollout of GST from July 1, 2017. These will be taken up in the next meeting of the GST Council on March 4-5, 2017.

- According to Finance Minister, the next step will be to fit the items into the various tax slabs after the bills are cleared by the Council.

CASE LAW - COMPETITION COMMISSION OF INDIA

Abuse of Dominance (Section 4 of the Competition Act, 2002)- Restrictive Clauses in the Flat Buyer's Agreement- Delay in Completion of Projects - Whether Constitutes Abuse of Dominance- Held, Yes.

Ashutosh Bhardwaj v. DLF Ltd &Ors [CCI] [*Case No. 01 of 2014 with Case No.93 of 2015][Devender Kumar Sikri, S. L. Bunker, Augustine Peter, U. C. Nahta& G. P. Mittal [Decided on 04/01/2017]*

Brief facts

Informants in both the cases have booked flats in the OP's housing project in Gurgaon. Informants booked flats and entered into flat buyer's agreement with OP. Even after making the payment flats were not handed over to them on the stipulated time. Further the progress of construction was also tardy. On the contrary, the OP's demanded further higher sums from the informants. In these circumstances the informants filed complaint before the CCI alleging abuse of dominance by the OP Group.

Analysis

The Commission has perused the material available on record and heard the counsels of the OPs and the Informant. The issue before the Commission for consideration and determination is whether the OP Group has contravened the provisions of Section 4 of the Act or not.

Reference may be made to Case Nos. 13 and 21 of 2010 and Case No. 55 of 2012 wherein the Commission has categorically opined that the technicality on the relevant product market need not be dwelled into if the dominance of the enterprise remains the same even in alternative relevant market definitions. The relevant Para is extracted herein below for reference:

'6.20 The Commission notes that determination of relevant market is important for assessing dominance of the Opposite Party. But defining relevant market is not an end in itself. If the primary reason for defining relevant market is assessment of dominance of a particular enterprise/ market player with regard to that relevant market, the Commission is of the opinion that such exercise can be dispensed with when such assessment remains unchanged in different alternative relevant market definitions. Therefore, when under possible alternative relevant market definitions, the conclusion on dominance remains the same; the Commission finds no reason to get into the technicalities of precisely defining relevant market.'

In the above case, the Commission has further opined that even secondary market will be not considered while defining relevant product market by referring to Belaire's case. The relevant extract in Belaire's case is provided herein below:

'12.35 .....While secondary market may have some bearing on the demand and supply variables, it certainly cannot form a part of the relevant market for the simple reason that the primary market is a market for service- while the secondary market is a market for immoveable property. Moreover, while building an apartment, a builder performs numerous development activities like landscaping, providing common facilities, apart from obtaining statutory licenses while a sale in secondary market merely transfers the ownership rights. An individual who is selling an apartment he or she has purchased cannot be considered as a competitor of DLF Ltd. or any other builder/ developer. Nor is he or she providing the service of building/ developing. The dynamics of such sale or purchase are completely different from those existing in the relevant market under consideration. The value added or the value reduced due to usage or otherwise does not even leave the apartment as the same one as had been built or developed by the builder/ developer...'

Drawing inference from the above, the Commission hereby reiterates that when the dominance of an enterprise remains unchanged in a market even with an alternative market definition, technicality of the product market need not be dwelled further. At the same time, the Commission sees no reason to deviate from the product market definition taken in earlier cases dealing with similar issues and project i.e., Case no. 13 and 21 of 2010 and 55 of 2012 where the relevant

product market was defined as the market for the 'provision of services for development/ sale of residential apartments'.

With regard to the relevant geographic market, the Commission agrees with the DG's view that Gurgaon would be the geographic region for the purpose of the present cases. Reference is made to the observation made by the Commission in Case Nos. 13 and 21 of 2010 and Case No. 55 of 2012 where Belaire's case was yet again referred to define the relevant geographic market. The relevant extract is provided herein below:

'6.23....The 'geographic region of Gurgaon' has gained relevance owing to its unique circumstances and proximity to Delhi, Airports, golf courses, world class malls. During the years it has evolved as a distinct brand image as a destination for upwardly mobile families. As it has been reasoned out in the order passed by this Commission in the Belaire case, a person working in NOIDA is unlikely to purchase an apartment in Gurgaon, as he would never intend to settle there. Thereafter, the Commission in that order distinguished between buyers looking for residential property out of their hard earned money or even by taking housing loans and those buyers who merely buy such residential apartments for investment purposes; stating clearly that the Commission was not looking at the concerns of speculators, but of genuine buyers. It was therefore, observed that a small 5% increase in the price of an apartment in Gurgaon, would not make a person shift his preference to Ghaziabad, Bahadurgarh or Faridabad or the peripheries of Delhi or even Delhi in a vast majority of cases. The COMPAT's order, dated 19.05.2014 passed while disposing of the appeals filed against the Commission's order in the Belaire case, upheld the Commission's finding on the relevant geographic market to be 'geographic region of Gurgaon'.....'

Based on the above, the Commission is of the view that geographic region of 'Gurgaon' is the appropriate relevant geographic market and not the entire NCR as contended by the OPs.

On the dominance of OP Group, there is no doubt that the strength which the OP Group possesses in residential real estate segment in the geographic region of Gurgaon is incomparable. In the order dated 12.05.2015 in Case Nos. 13 and 21 of 2010 and Case No. 55 of 2012, the Commission has dwelled into details on the aspect of dominance of the OP Group and has thoroughly assessed the DG's findings. Thereafter, it was finally concluded that the OP Group held a dominant position in the relevant market. The assessment done by the Commission in the previous orders will also apply in the present matters since the issues, the relevant period and the OPs involved are the same. Therefore, it is opined that the OP Group holds a dominant position in the market for the 'provision of services for development/sale of residential apartments in Gurgaon'.

With regard to the issue of abuse of dominance, the Commission notes that the same has already been dealt with by the Commission in its previous orders. It was held that those terms and conditions imposed through the Agreement were abusive being unfair within the meaning of Section 4(2) (a) (i) of the Act. For the sake of brevity, the analysis on the alleged abusive terms is not provided herein. Considering the assessment done in the previous cases including Belaire's case, the Commission is of the view that the terms and conditions imposed on the allottees in the instant matters as analysed by the DG in detail are abusive in nature and the OP Group has contravened Section 4(2)(a)(i) of the Act.

In view of the above, and in exercise of powers under Section 27(a) of the Act, the Commission directs the OP Group to cease and desist from indulging in the conduct which is found to be unfair and abusive in terms of the provisions of Section 4 of the Act.

With regard to penalty the Commission is of the view that since a penalty of Rs. 630 crores has already been imposed on the OP Group in the Belaire's case for the same time period to which the present cases belong, no financial penalty under Section 27 of the Act is required to be imposed. In view of the totality and peculiarity of the facts and circumstances, the Commission does not deem it necessary to impose any penalty on the OP Group in these cases.

Decision

Cease & desist order passed.

Team ICSI