



**COMPETITION COMMISSION OF INDIA**

**Case No. 45 of 2016**

**In Re:**

**Mohan Meakin Limited**

**Informant**

**And**

**GAIL (India) Limited**

**Opposite Party**

**CORAM**

**Mr. S. L. Bunker  
Member**

**Mr. Augustine Peter  
Member**

**Mr. Justice G.P. Mittal  
Member**

**Appearances during the preliminary conference on 6<sup>th</sup> October, 2016:**

*For the Informant:* Mr. Dhruv Agrawal, Senior Advocate  
Mr. Nishit Agrawal, Advocate  
Mr. R. C. Jain, Director

*For the Opposite Party:* Mr. Ramji Srinivasan, Senior Advocate  
Mr. Kapil Kher, Advocate  
Mr. Vivek Paul Oriel, Advocate  
Ms. Nikita Ved, Dy. Manager (Law)



### Order under Section 26(1) of the Competition Act, 2002

1. Mohan Meakin Limited (“**Informant**”) has filed the present information under Section 19(1)(a) of the Competition Act, 2002 (“**Act**”) against GAIL (India) Limited (“**Opposite Party**”) alleging contravention of the provisions of Section 4 of the Act.
2. As per the information, the Informant is, *inter alia*, engaged in the manufacture of glass bottles. The Informant requires natural gas *i.e.*, Regasified Liquefied Natural Gas (“**RLNG**”) for carrying out its manufacturing activities. The Informant has entered into a Gas Sale Agreement with the Opposite Party on 27<sup>th</sup> December, 2008 (hereinafter referred to as “**GSA**”) to procure natural gas for use at its plant/premises located at Mohan Nagar, Ghaziabad. The Informant claims that the cost of manufacture of the end product is heavily dependent on the price of RLNG.
3. The Opposite Party is a company incorporated under the *erstwhile* Companies Act, 1956, and is, *inter alia*, engaged in the exploration, extraction, processing of natural gas (including RLNG) and marketing and distribution of related products in various states in India *i.e.*, Andhra Pradesh, Delhi, Goa, Gujarat, Haryana, Karnataka, Kerala, Madhya Pradesh, Maharashtra, Punjab, Rajasthan *etc.* As per the information, the Opposite Party has a huge network of pipeline infrastructure for gas transportation stretching a length of 10,977 kms with a capacity of 210 Million Metric Standard Cubic Meter per Day (MMSCMD).
4. The primary concern of the Informant relates to the differences in price charged by the Opposite Party from its customers located at Ghaziabad and Firozabad, and the unfair nature of the terms and conditions of the



GSA entered into between the Informant and the Opposite Party. A brief summary of the allegations is as under:

- 4.1 Citing reference to the earlier order dated 27<sup>th</sup> October, 2015 of the Commission passed under Section 26(2) of the Act, in Case No 51/2015, the Informant has submitted that the Opposite Party is dominant in the relevant market for supply and distribution of natural gas to industrial consumers in Western Uttar Pradesh.
- 4.2 The Informant has stated that the Opposite Party supplies natural gas to the Informant for its glass bottle manufacturing facility situated at Mohan Nagar, Ghaziabad, Uttar Pradesh and also to other glass bottle manufacturing factories located at Firozabad, Uttar Pradesh. For the past several years, the Opposite Party had supplied RLNG to the Informant's unit at a much higher price in comparison to the prices charged from the other manufacturing units located at Firozabad. Such differential pricing is allegedly discriminatory and has resulted in heavy losses to the Informant leading to closure of its glass bottle manufacturing unit/ factory in November/ December, 2013. The Informant has furnished the details of comparative prices at which the Opposite Party has sold RLNG to the Informant and to other glass factories at Firozabad between 2010 and 2013.
- 4.3 Because of the shutdown of its manufacturing unit, the Informant informed the Opposite Party that it would require only 4000 Standard Cubic Meter (SCM) of gas per day against the initial contracted quantity of 25000 SCM per day. Consequently, the pipeline and turbine meter installed at the site of the Informant were changed in order to make it suitable for receiving and measuring 4000 SCM of gas per day and a joint record in that regard was stated to have been issued by the Opposite Party on



14<sup>th</sup> March, 2014. However, after around a year, the Opposite Party imposed take or pay liability and sought to encash the letter of credit furnished by the Informant. This, according to the Informant, amounts to abuse of dominant position by the Opposite Party.

4.4 The Informant has further alleged that it did not have any power, whatsoever, to terminate the GSA while the Opposite Party enjoys unbridled power to terminate the said agreement. The Informant has contended that a consumer cannot be forced to lift a specified quantity of natural gas for a contract period of 20 years irrespective of any change in the circumstances. Further, the requirement that the buyers furnish an unconditional, standby, automatic revolving and irrevocable letter of credit enables the Opposite Party to withdraw any amount, howsoever unreasonable, without there being any recourse available to the buyer. The said clause of the GSA has been stated to be an unfair imposition amounting to abuse of dominant position. The Informant has asked the Commission to examine the clauses of the GSA and declare those relating to letter of credit (Art. 12.7), take or pay obligation (Art. 14) and suspension and termination (Art. 19.4) as void, being in contravention of Section 4 of the Act.

4.5 The Informant has also alleged that the Opposite Party, *vide* letter dated 21<sup>st</sup> January, 2016 and an e-mail dated 3<sup>rd</sup> February, 2016, has required the Informant to sign a side letter, amending the terms and conditions of the GSA, failing to abide by which, take or pay liability would be raised upon the Informant. The side letter sought to treat gas not taken by the Informant below Adjusted Annual Contract Quantity (AACQ) for contract year



2015, as Downward Flexibility Quantity for the contract year 2015. Further, the Opposite Party imposed take or pay liability on the Informant notwithstanding the directions of the Hon'ble Delhi High Court in the arbitration proceedings initiated by the Informant.

5. The Commission considered the information in its Ordinary Meeting held on 5<sup>th</sup> July, 2016 and decided to have a preliminary conference with the parties on 18<sup>th</sup> August, 2016. However, pursuant to the request of the Opposite Party, the preliminary conference was adjourned to 6<sup>th</sup> October, 2016. Accordingly, the Commission heard the parties on 6<sup>th</sup> October, 2016. During the preliminary conference, the Informant reiterated the facts and allegations presented in the information. On the other hand, the Opposite Party submitted that the issues raised by the Informant are contractual disputes and do not give rise to any competition concern. The learned counsel for the Opposite Party also contended that the Informant had preferred an appeal against the earlier order of the Commission passed in Case No. 51/2015, but the same was dismissed by the Competition Appellate Tribunal (COMPAT) as withdrawn. He further contended that the Commission and the COMPAT have already dealt with the allegations levelled in the present information and there is no valid reason for the Commission to re-consider the same again.
6. Subsequently, the Informant filed an additional submission dated 6<sup>th</sup> December, 2016 primarily pointing out that the Commission has ordered investigation against GAIL *vide* order dated 3<sup>rd</sup> October, 2016 passed in Case Nos. 16, 17, 18, 19 and 20/2016.



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7. The Commission has carefully considered the information, the material available on record and the submissions made by the learned counsel for the parties during the preliminary conference.
8. At the outset, the Commission notes that the Informant had earlier filed an information bearing Case No. 51/2015 against the Opposite Party making similar allegations of abuse of dominant position. Barring the facts relating to the requirement of the Opposite Party regarding the side letter dated 21<sup>st</sup> January, 2016 and the imposition of take or pay liability on the Informant for refusing the said letter, there is no substantial difference in the facts presented in Case No. 51/2015 and the present information. The Commission had disposed of the information bearing Case No. 51/2015 by passing an order under Section 26(2) of the Act on 27<sup>th</sup> October, 2015, the relevant extracts of which are as under:

*“16. In this regard, it is pertinent to mention here that the Commission has dealt with similar issue in various cases. In Case No. 71 of 2012 (Faridabad Industries Association (FIA) Vs M/s Adani Gas Limited), the Commission while examining the relevant product market categorised the consumers of natural gas into two different categories i.e., industrial and domestic based on intended use and the price of natural gas. While industrial consumers use the purchased gas to meet the fuel and energy requirements of their plants, the end use of gas in case of domestic consumers is self-consumption/ domestic cooking purposes which is entirely different from industrial consumers. As such, the Commission is of the view that the same reasoning applies to the present case. As the Informant is a buyer of natural gas from the Opposite Party for commercial/ industrial use, the relevant product market in this case is the market for ‘supply and distribution of natural gas to industrial consumers’.*



17. *As far the relevant geographic market is concerned, the Commission notes that the natural gas is generally transported through either city gas distribution network or through pipeline. The Commission observes that the laying down of city gas distribution network or pipeline is authorised by Petroleum and Natural Gas Regulatory Board (PNGRB) in every city/ state. The determination of relevant geographic market is therefore dependent on the facts and circumstances of every particular case. While the city gas distribution network is confined to a particular city, a pipeline may pass through various States. Therefore, the geographic market in the present case cannot be taken to be the whole of India but has to be limited to the particular geographic city/ State in which the actual consumer(s) are located i.e., the state of Uttar Pradesh. Accordingly, the geographic market in the present case would be 'the State of Uttar Pradesh'.*
18. *In view of the relevant product market and the relevant geographic market defined above, the relevant market in the present case may be considered as the market for 'supply and distribution of natural gas to industrial consumers in Uttar Pradesh'.*
19. *As per the information available in the public domain, the Opposite Party possesses a position of strength in the relevant market as determined above. As per the TERI Energy Data Directory & Yearbook (TEDDY) 2012-13, there are three major pipeline entities engaged in gas transportation across the country i.e., the Opposite Party, Reliance Gas Transportation Infrastructure Limited (RGTIL) and Gujarat State Petroleum Corporation (GSPCL). The Opposite Party is operating the Hazira-Vijapipur-Jagdishpur (HVJ) and Dahejpur-Vijaipur*



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*Pipelines (DVPL) which constitute about 10841 km (about 70.67%). The recently commissioned Dhabhol-Banglore pipeline is also owned and operated by the Opposite Party. RGTIL is operating 1469 km (about 9.57%) East-West pipeline (EWPL) to evacuate gas from KG-D6 gas in Andhra Pradesh. GSPL is mainly focused in the state of Gujarat consisting about 1874 km (about 12.22%).*

- 20. The preliminary review of the gas transportation sector suggests that the pipelines operated by these three entities mentioned above cater to the States through which they pass. Therefore, if one entity operates in one State and owns the infrastructure (i.e., the pipeline) in that State, it faces no competition as such from other two entities. As per its official website, the Opposite Party has adopted a gas management system to handle multiple sources of supply and delivery of gas in a co-mingled form and provide a seamless interface between shippers, customers, transporters and suppliers and is present in sixteen states including Uttar Pradesh. In addition, the Opposite Party also operates regional gas pipeline network across India.*
- 21. Further, as per the publically available information, there are four natural gas pipelines in the State of Uttar Pradesh which cover seventeen major districts of Uttar Pradesh. They are: HVJ-GREP-DVPL Natural Gas Pipeline, DVPL-GREP Capacity augmentation Trunk Pipeline, Dadri-Bawana-Nangal Natural Gas Pipeline and Karanpur-Moradabad-Kashipur-Rudrapur Natural Gas Pipeline. All these pipelines are owned by the Opposite Party. Therefore, it appears that the Opposite Party holds a position of strength being the owner of the network/ gas transportation pipeline for supply and distribution of R-LNG in the state of Uttar Pradesh.*





22. *In view of the above discussion, the Commission is of the view that the Opposite Party appears to be dominant in the relevant market of 'supply and distribution of natural gas to industrial consumers in Uttar Pradesh'.*
23. *That brings the Commission to analyse whether the conduct of the Opposite Party is abusive within the meaning of section 4 of the Act. At the outset, it may be noted that since the GSA between the Opposite Party and the Informant pertains to 2008, the clauses are not specifically looked into by the Commission, the same being beyond the scope of scrutiny. It is apparent that one of the main contentions of the Informant is that the Opposite Party reduced the annual contracted quantity from 25000 SCM to 4000 SCM which was duly recorded in the joint minutes of the meeting dated 14.03.2014. However, the Commission notes that the same was refuted by the Opposite Party. The Commission perused the exchange of letters between the Opposite Party and the Informant. The letter dated 13.02.2014 was sent by the Informant asking for a reduction in the annual contracted quantity from 25000 SCM to 4000 SCM. Thereafter, the Informant has annexed another letter dated 14.03.2014 wherein it has mentioned about a letter from GAIL (dated 20.02.2014) wherein the Opposite Party has demanded an LOC for Rs. 4.74/- crores. Thereafter, the Informant has annexed many more letters wherein it has requested the Opposite Party to execute a contract for the reduced annual contracted quantity but there is no document to support that the Opposite Party had agreed to it. From the correspondences placed on record, it appears that the Informant was requesting the Opposite Party to reduce the annual contracted quantity and execute a fresh LOC accordingly. However, there is nothing on*



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*record to suggest that the same was accepted by the Opposite Party. Therefore, the demand by the Opposite Party for Rs. 4.74/- crores cannot be termed as arbitrary or unfair.*

24. *On differential pricing, the Informant has alleged that the Opposite Party discriminated between the Informant in Ghaziabad and other similarly placed glass bottle factories which are located in Firozabad. The Opposite Party has contended that the R-LNG supplied to plants in Firozabad was different from the R-LNG supplied to the Informant and since the former was covered by APM, the Opposite Party had no control over it. In this context it may be relevant to note that in Case No. 20 of 2013 (M/s Saint Gobain Glass India Limited vs M/s Gujarat Gas Company Limited.), the Commission segregated the relevant product market on the basis of price mechanism applicable to various segments of consumers i.e., Administered Price Mechanism (APM) and Non-Administered Price Mechanism (Non-APM). It was noted that APM natural gas is meant for a select group of consumers such as consumers of power sector, fertiliser sector, consumers covered under court orders and those having allocation of less than 0.05 MMSCMD of natural gas, therefore, it cannot be clubbed with non-APM natural gas to form a single relevant product market.*
25. *The Commission notes that in the present case, while the Informant belongs to a category where APM does not apply, the glass bottle factories located in Firozabad (Taj Trapezium Zone) are covered under APM pursuant to an order passed by the Hon'ble Supreme Court as cited by the Opposite Party. It may be noted that where non-APM is applicable, the prices of R-LNG imported into the country by PLL are determined by the fuel oil linkages as part of the contracts signed between individual*



*companies like RasGas and PLLI. The end user price of R-LNG is not subsidized by the Government of India and hence is a complex mix of various components such as purchase price, exchange rate, regasification charges, transmission charges, taxes, contractual risks, competing fuel pricing etc. However, in case of segments or class of consumers falling under the APM category, it appears that the supplier has no control over the prices of gas as contended by the Opposite Party. The Commission is convinced with the reasoning provided by the Opposite Party that the manufacturing unit of the Informant and the manufacturing units in Firozabad are distinct categories of consumers and hence the difference in R-LNG prices between these categories cannot be termed as discriminatory.”*

9. Aggrieved by the aforesaid Order of the Commission, the Informant had filed an appeal before the COMPAT (Appeal No. 50/2016 titled *Mohan Meakin Limited v. Competition Commission of India*). The Hon’ble COMPAT had dismissed the said appeal as withdrawn *vide* order dated 7<sup>th</sup> March, 2016. The relevant extract of the said order is as under:

*“After arguing the case for some time, learned counsel for the appellant, on instructions, made a request that his client may be permitted to withdraw the appeal.*

*The request made by the learned counsel is accepted and the appeal is dismissed as withdrawn. As a sequel to this, IA No.50 of 2016 filed by the appellant is also dismissed.”*

10. The Commission notes that the parties have not brought on record anything substantial which could materially affect the above assessment and determination regarding the relevant market and the position of



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strength enjoyed by the Opposite Party. As regards the examination of allegations, the Commission notes that in view of the order dated 27<sup>th</sup> October, 2015 passed by the Commission and the appeal proceedings thereafter, the Commission does not see any reason to reconsider the allegations that were levelled in the earlier information bearing Case No. 51/2015. However, through the instant information, the Informant has made additional averments and allegations, which could be a matter for examination by the Commission and are being examined as under.

11. The gist of the additional averments is that the Opposite Party, *vide* communications dated 21<sup>st</sup> January, 2016 and 3<sup>rd</sup> February 2016, demanded the Informant to sign a side letter amending the GSA, in the absence of which take or pay liability would be imposed on the Informant for the contract year 2015. The side letter sought to treat gas not taken by the Informant below AACQ for contract year 2015, as Downward Flexibility Quantity for the contract year 2015. This proposal was not agreed to by the Informant. Thereafter, the Informant also initiated arbitration proceedings on 12<sup>th</sup> February, 2016 in connection with its dispute with the Opposite Party. In the meantime, the Opposite Party went ahead and imposed take or pay liability as per the terms of the GSA.
12. It is observed that after the order dated 27<sup>th</sup> October, 2015, passed under Section 26(2) of the Act, in the earlier information filed by the Informant, the Commission had received five other informations against the Opposite Party (Cases No. 16 to 20/2016). These were also concerned with unfair terms and conditions in the GSA and unfair imposition of take or pay liability. The Commission, *vide* a common order dated 3<sup>rd</sup> October, 2016, has directed the Director General (DG) to cause an investigation into those matters for reasons detailed therein. It is relevant to note that in all these matters, GAIL had *inter alia*



submitted that “*take or pay liability, as imposed on the customers, was only to neutralize the losses borne by the Opposite Party due to non off-take or under-drawal by the customers as per the respective GSAs, and was not to make any profits on account of take or pay deficiency. The same also formed basis of reduction in the take or pay claim by the Opposite Party*”. In the instant matter, *vide* letter dated 26<sup>th</sup> February, 2016, the Opposite Party has demanded Rs. 27.5 crores as take or pay liability for the calendar year 2015. This was later revised to Rs. 29.5 crores *vide* letter dated 29<sup>th</sup> February, 2016. Unlike the liability raised for the calendar year 2014 where only proportional liability was raised, full liability was imposed on the Informant for the calendar year 2015 since it refused to sign the side letter dated 21<sup>st</sup> January, 2016 accepting the terms proposed by the Opposite Party.

13. The Commission notes that as per the GSA, the Informant has to take 90% of the contracted quantity every year failing which it has to pay for the quantities unlifted. Such liability is termed as take or pay liability. The conduct of the Opposite Party in implementing take or pay liability only from 2015 appears to be a modus to ensure *de facto* exclusivity of the contractual arrangement. This, besides prohibiting the buyers from shifting to alternatives or terminating the GSA in the event of closure of their business, also appears to create entry barriers for alternative suppliers to enter the market of supply of natural gas or build up a viable customer base. It is observed that while imposition of take or pay liability as per contractual terms cannot *per se* be regarded as abuse of dominant position, the same being imposed in an exploitative manner without justification or to ensure *de facto* exclusivity thereby causing hurdles to potential entrants or to the expansion of competitors warrants investigation under the provisions of the Act prohibiting abuse of dominant position. In view of the above, the Commission is convinced



that the facts presented in the instant information *prima facie* suggest contravention of Section 4(2)(a) and Section 4(2)(c) of the Act.

14. In its recent order dated 14<sup>th</sup> July, 2017 passed under Section 26(1) of the Act in Case No. 2/2017, the Commission dealt with the same allegation of *de facto* exclusivity arising out of take or pay obligation imposed by the Opposite Party. In the said order, the Commission, *inter alia*, observed that “...full ToP liability has been imposed on the Informant for the calendar year 2015. In the earlier cases, the Opposite Party also contended that it faces ToP obligation under its contracts with certain upstream suppliers. In this regard, the Commission finds it relevant to inquire into: the different sources of gas procurement by the Opposite Party and the nature of arrangements with each supplier including price and ToP liability under each such arrangement; whether the gas supplied to the customers of the Opposite Party is supplied from a commingled stream, in which case, what is the basis for price determination/ revision from time to time; whether ToP liability was imposed on the Opposite Party by its upstream suppliers for the contract year 2015; whether the Opposite Party has suffered any loss on account of non off-take or under-drawl of gas by its contracted customers during the contract year 2015; what were the total ToP liabilities levied by the Opposite Party on all its customers located across India for the contract year 2015; whether the Opposite Party had adopted any discriminatory practice in imposition of ToP liability upon its customers located across India; whether the Opposite Party imposed full ToP liability only in cases where the concerned buyer contested the legality of the ToP claim or resorted to litigation/ arbitration proceedings; and the policy, if any, of the Opposite Party regarding imposition of different liability upon different class of customers. It would also be relevant to appreciate the rationale behind the Opposite Party committing ToP liability to its



*upstream suppliers for a long period i.e. whether the Opposite Party took into consideration the potential inclusions and exclusions in its customer base, fluctuations in prices, different modes of risk management etc.”* As the allegations levelled in Case No. 2/2017 were similar to and connected with the issues in the earlier matters referred to above and are currently being investigated by the DG in Cases No. 16 to 20 of 2016, the Commission clubbed both the matters.

15. Since the allegation of *de facto* exclusivity is already under investigation in Case No. 2/2017, the Commission, in exercise of the powers conferred under *proviso* to Section 26 (1) of the Act read with Regulation 27 of the Competition Commission of India (General) Regulations, 2009, clubs the instant information with Cases No. 16 to 20/2017 and Case No. 2/2017. The DG is directed to file a consolidated investigation report in all these matters.
16. The Secretary is directed to transmit a copy of this order along with copies of the records to the DG forthwith.

Sd/-  
**(S. L. Bunker)**  
Member

Sd/-  
**(Augustine Peter)**  
Member

Sd/-  
**(Justice G. P. Mittal)**  
Member

New Delhi  
Date: 17/07/2017