



Competition Commission of India



(Case No.51 of 2011)

In the matter of:

M/s HNG Float Glass India Ltd.

Informants

And

M/s Saint Gobain Glass India Ltd.

Opposite Party

CORAM:

Mr. Ashok Chawla
Chairperson

Dr. Geeta Gouri
Member

Mr. Anurag Goel
Member

Mr. Justice (Retd.) S N Dhingra
Member

Mr. M.L. Tayal
Member

Mr. S L Bunker
Member

Supplementary Order by Dr. Geeta Gouri

1. I have gone through the Order passed by the majority of the members of the Commission. While agreeing with the other members on the fact that OP is not dominant in the relevant market, I part with the majority Order on its' stance of going a step further and analysing abuse of dominance even when the OP has not been found dominant. A careful reading of the Act and the relevant provisions on abuse of dominance it is clear that the analysis of abuse of dominance allegations is only required when the opposite party is found dominant.



2. In this case, by the virtue of the Explanation to Section 4 read in conjunction with Section 19(4), the Commission has concluded in the majority Order that the OP SGGIL lacks market power to restrict effective competition in the relevant market and is therefore not dominant. I am in complete agreement with the majority Order in respect of conclusion on dominance of OP.
3. The Commission in the majority Order, after concluding OP as not dominant, has gone into analysis of abuse of dominance allegations to ascertain contravention of the provisions of Section 4. In my opinion, this exercise is not warranted, as the Section deals with 'Abuse of Dominance' and not 'Abuse' per se.
4. Section 4(1) of the Act provides:
“No enterprise or group shall abuse its dominant position.”
The reading of Section 4(1) implies that dominance is a pre-condition for finding any contravention of section 4 of the Act. Thus, it follows that a non-dominant firm's conduct cannot be found abusive; the corollary also holds true that no firm can engage in an abusive conduct unless it is dominant. Only an enterprise which is dominant can be in a position to impede effective competition and causing harm to competition, while no such conclusion can be ascribed to the behaviour of a non-dominant firm and hence there is no point in analysis of conduct for the purpose of establishing abuse in such cases.
5. The theory of competition harm is logically consistent with the abusive conduct of a dominant firm. Without this pre-condition to inquire into abuse of a non-dominant may at best lead to speculative competition concerns sans enforcement action.



6. On the contrary, the conduct can be analyzed for the assessment of dominance in conformity with the spirit of Explanation (a) to section 4 of the Act, which defines dominant position as:
- “dominant position” means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to—*
- (i) operate independently of competitive forces prevailing in the relevant market; or*
- (ii) affect its competitors or consumers or the relevant market in its favour”.*
7. There may be cases, where conduct of the parties may be indicative of their **ability** to impede effective competition. In such cases, analysis of conduct can assist the Commission in concluding dominance. For example, the possession of economic strength and the **ability** to exclude may be inferred from the conduct, but the abuse of dominance analysis would require establishing of actual exclusionary conduct. If the ability exists and the firm is indeed dominant, it is only then that the effect of the conduct has to be analysed extending the effects based approach to competition law.
8. In this case, it is very clear that the OP is not dominant in the relevant market and not in a position to impede effective competition. The exercise therefore of analysing abuse in the wake of the Commission concluding that the OP is not dominant is unwarranted and infructuous to the extent that Commission would not be able to take enforcement measures in the present case.

The Secretary is directed to inform the parties accordingly.

Date: 24/10/2013

Sd/-
(Dr. GeetaGouri)
Member