2015 CompLR 0728 (CCI)*

IN THE COMPETITION COMMISSION OF INDIA

Pankaj Aggarwal and Ors.
v.
DLF Gurgaon Home Developers Private Limited

CASE NOS. 13, 21 OF 2010 AND 55 OF 2012
DECIDED ON: 12.05.2015

Coram

Ashok Chawla, Chairperson, S.L. Bunker, Sudhir Mital, Augustine Peter and U.C. Nahta, Members

Counsel

For Appellant/Petitioner/Plaintiff: None

For Respondents/Defendant: Ramji Srinivasan, Sr. Adv.; G.R. Bhatia, Adv.; H.S. Chandhoke, Adv.; Kanika Chaudhary Nayar, Adv., Nidhi Singh Prakash, Adv., Tripti Malhotra, Adv., and Poonam Madan, Adv.; For New Town Heights Home Owner's Association (Intervener): M.L. Lahoty, Adv., and Paban Kumar Sharma, Adv.

Cases referred

Belaire Owners' Assn. v. DLF Ltd., HUDA & Ors. MANU/CO/0044/2011: 2011Com PLR 239 (CCI): [2011] 104CLA398 (CCI) (Affirmed) [p. 0736, para 5.4 b]

DGCOM Buyers & Owners Associations, Chennai v. M/s. DLF Ltd., New Delhi & M/s. DLF Southern Homes Pvt. Ltd., Chennai, MANU/CO/0103/2012: 2012Com PLR 1164 (CCI): [2013] 117 SCL 79 (CCI) (Discussed) [p. 0737, para 5.10 b]

M/s. Moran Plantation Pvt. Ltd. & Ors. v. M/s. Ambience Private Limited & Ors. MANU/CO/0027/2014 (Discussed) [p. 0737, para 5.9 a]

Acts/Rules/Orders

Competition Act, 2002

Section 4	[p. 0730, para 2.2 f]
Section 4(2)(a)	[p. 0735, para 4.23 e]
Section 4(2)(a)(i)	[p. 0731, para 2.5 d]
Section 5	[p. 0733, para 4.10 b]
Section 19(1)(a)	[p. 0730, para 2.2 f]
Section 19(4)	[p. 0733, para 4.10 c]
Sections 19(6), 19(7)	[p. 0732, para 4.5 e]
Section 26(1)	[p. 0731, para 3.1 h]
Section 26(8)	[p. 0732, para 4.2 b]
Section 27(a)	[p. 0752, para 7 e]

Consumer Protection Act, 1986

Section 2(f)	[p. 0743, para 6.11 d]
Section 2(o)	[p. 0743, para 6.11 c]
Section 2(u)	[p. 0743, para 6.11 d]

* MANU/CO/0038/2015

Indian Contracts Act, 1872 [p. 0742, para 6.10 i]

Societies Registration Act, 1860 [p. 0739, para 5.23 d]

Issues and Findings

Jurisdiction — Abuse of dominant position — Whether Commission has jurisdiction to analyze conduct of Opposite Party emanating from Buyers' Agreement which have been alleged to be one-sided and hence, abusive in present case —

Held, This Tribunal noted that Opposite Party had stated that as per COMPAT's order , since concept of 'imposition', 'abuse' or 'dominance' was not present at time of signing of 'Buyers' Agreements', 'Buyers' Agreements' were perfectly valid and non-abusive. Further, it was alleged that conditions which were imposed on parties/ buyers, prior to 2009 should not be subjected to scrutiny of Section 4 of Competition Act, 2002/Act. This was a completely wrong understanding of law based on a very selective reading of COMPAT's order. Further, it may also be noted that Commission was fully cognizant of legal position that Act was not retrospective but prospective in nature. However, that does not mean that fact of execution of an agreement prior to 20th May, 2009 would immunize conduct of Opposite Party/OP altogether from scrutiny of Act. Looking at broader spirit of Act and duty that has been cast on Commission by legislature, it will be inappropriate to decide every case qua Informant only. Informant is but one of mediums through which Commission becomes aware of distortion of competition or market irregularities. Also to say that investigation and analysis of Commission should be restricted to conduct of OP towards a particular Informant/consumer would hamper very objective and spirit of Act. Hence, Commission was of opinion that it has jurisdiction in present cases before it.

Relevant market — Determination of — What is relevant market in instant case and that whether same has been determined in instant case —

Held, This Commission considers it appropriate to delineate relevant product market as market for ' the provision of services for development/sale of residential apartments'. With regard to relevant geographic market, Commission was of view that relevant geographic market would be 'geographic region of Gurgaon'. Hence, relevant market would be market for 'the provision of services for development/sale of residential apartments in Gurgaon'.

Dominant position — Determination of — Whether Opposite Party is dominant in said relevant market —

Held, This Commission has no doubt in concluding that strength which OP possesses in residential real estate segment in geographic region of Gurgaon was incomparable. Moreover, DG carried out extensive analysis and took into account all factors laid out under Section 19(4) of Act. Further, conclusions of DG based on CMIE database in respect of about 118 real estate companies across India whereby it was found that OP group has about 69 per cent of gross fixed assets and 45 per cent of capital employed cannot be ignored. Further, land bank of OP, information about which was referred to in Red Hearing Prospectus issued by OP itself acknowledges that OP group had a total land bank of 10,225 acres out of which 49 per cent is located in Gurgaon alone. Moreover, size and resources, economic strength of enterprise including commercial advantage over competitors, regulatory barriers in real estate segment, dependence of consumers on OP also indicate that OP held a dominant position in relevant market.

Abuse of dominant position — Violation of proviso – Section 4 of Competition Act, 2002/Act — Whether Opposite Party has violated provisions of Section 4 of Act —

Held, This Commission observed from evidence on record that conduct of OP in making additions to number of floors beyond number intimated to apartment allottee amounts to abuse of dominant position. Further, DG also found merit in allegations posed against OP regarding forfeiture of booking amount in case a buyer wishes to cancel allotment in pursuance of Clause 3 and 4 of Buyer's Agreement. Also DG found that as per Clause 9 and 10, no right had been provided to buyers to raise any objection towards alterations/modifications. Further, DG found that when apartment buyers raised issues with OP regarding various misrepresentations, they were threatened that their allotments would be cancelled. Thereafter, OP cancelled allotment of certain buyers and forfeited their booking amount of about Rs. 7 lacs each. This act of cancellation on arbitrary terms also amounts to abuse. Also, unilateral imposition of additional demands made by OP which were not expected by Informants amounts to imposition of unfair condition. Such impositions, which were levied on Informants post 20th May, 2009, amounts to imposition of unfair conditions on apartment buyers by OP. Lastly Commission accepted DG's findings and held that terms and conditions imposed through Buyer's Agreement were abusive being unfair within meaning of Section 4(2)(a)(i) of Act.

ORDER

Order under Section 27 of the Competition Act, 2002

1. This common order shall govern the disposal of the informations filed in Case. Nos. 13 & 21 of 2010 and Case No. 55 of 2012, as the issues involved in these cases are the same.

Facts

2.1 Facts of the case, as stated in the informations, may be briefly noted:

Case No. 13 & 21 of 2010

2.2 The informations in Case Nos. 13 & 21 of 2010 were filed under Section 19(1)(a) of the Competition Act, 2002 (hereinafter referred to as 'the Act') by Mr. Pankaj Aggarwal and Mr. Sachin Aggarwal, respectively (hereinafter referred to as 'Informants') against DLF Gurgaon Home Developers Private Limited (hereinafter referred to as the 'Opposite Party in Case Nos. 13 & 21 of 2010') alleging, *inter alia*, contravention of the provisions of Section 4 of the Act.

2.3 As per the Informants, in March 2008, they were approached by brokers/agents of DLF New Gurgaon Home Developers Private Limited for the launch of Opposite Party in Case Nos. 13 & 21 of 2010's new project under the name and style of "DLF New Town Heights" (hereinafter referred to as 'the Project'). The Informants were lured to book an apartment in the pre-launch scheme in the abovesaid Project. The Informants found the rates of the apartment in the Project very attractive and accordingly, both of them booked an apartment each. The broker asked the Informants to provide their details for necessary formalities; however, the Informants were instructed to leave the date and other columns blank. The Informants were allotted two apartments in the Project. The Opposite Party in Case Nos. 13 & 21 of 2010 sent a two and half year installment payment plan to the Informants *vide* letters dated 1st May, 2008 and 5th May, 2008. The Opposite Party in Case Nos. 13 & 21 of 2010 also made various demands on different dates but the Informants did not make any

payments as there was no sign of construction/development at the Project site. Consequently, the Informants received first and second reminders in the month of October, 2008 and the final notice in November, 2008. From the letters sent by the Opposite Party in Case Nos. 13 & 21 of 2010 forwarding the 'Agreement to Sell' to the Informants, it was clear that the construction work had not started and the Opposite Party in Case Nos. 13 & 21 of 2010 was only collecting huge amounts from allottees/buyers (hereinafter referred to as 'the buyers') who had booked apartments with them.

2.4 Informants wrote letters to the Opposite Party in Case Nos. 13 & 21 of 2010 for cancellation of allotment and requesting for refund of amounts paid by them, but were informed that applications signed by buyers were irrevocable and the request for cancellation cannot be acceded to. The only option available with the Informants was to sell the property in open market. After two years of booking, i.e. in February, 2010, the Opposite Party in Case Nos. 13 & 21 of 2010 intimated the Informants that foundation work has been completed and Informants were required to make payments as per the plans.

2.5 On the basis of above allegations as well as imposition of unfair and onerous terms and conditions, the Informants prayed before the Commission to initiate an inquiry into the alleged conduct of the Opposite Party in Case Nos. 13 & 21 of 2010 for abuse of dominant position in contravention of provisions of Section 4(2)(a)(i) of the Act.

Case No. 55 of 2012

2.6 The information in Case No. 55 of 2012 was filed under Section 19(1)(a) of the Act by Mr. Anil Kumar (hereinafter referred to as 'Informant') against DLF Home Developers Limited (hereinafter referred to as the 'Opposite Party in Case No. 55 of 2012) alleging, *inter alia*, contravention of the provisions of Sections 4 of the Act.

2.7 The Informant had booked an apartment Bearing No. NGP 023 in New Town Heights, Sector 90, Gurgaon. The Informant alleged that Opposite Party in Case No. 55 of 2012 abused its dominant position by adopting practices like allotment of back to back parking on compulsory payment of additional Rs. 1.5 lacs, non-transparent calculation of advance payment rebate, additional payments towards External Development Charges (EDC)/Infrastructure Development Charges (IDC) on the increased area etc.

2.8 The Opposite Party in Case Nos. 13 & 21 of 2010 and the Opposite Party in Case No. 55 of 2012 have been collectively referred to as the 'Opposite Party/DLF' unless expressly stated otherwise. Similarly, the Informants in all these cases are collectively referred to as the 'Informants'.

3. Order for DG investigation:

3.1 After considering the facts, allegations and supporting documents filed by the Informants, Commission was of the *prima facie* opinion that the Opposite Party abused its dominant position in the real estate segment in the geographic market of Gurgaon. Accordingly, Commission issued a direction under Section 26(1) of the Act to the Director General (hereinafter referred to as the 'DG') to investigate the matter. The Commission *vide* its *prima facie* orders dated 22nd April, 2010, 24th May, 2010 and 27th November, 2012 in Case Nos. 13 of 2010, 21 of 2010 and 55 of 2012 respectively, directed the DG to conduct an investigation into the allegations made by the Informants.

4. Investigation and Analysis by the DG

4.1 During the course of investigation, DG *inter alia* examined the agreements entered into between the Informants and Opposite Party (hereinafter referred to as the 'Buyer's Agreement/s'). Further, the DG took into account the letters and communications exchanged between Opposite Party and Informants.

4.2 The DG completed the investigation and submitted the report in respect of Case Nos. 13 & 21 of 2010 on 2nd November, 2010. Thereafter, pursuant to Commission's directions under Section 26(8) of the Act, the DG submitted a supplementary DG report on 26th October, 2012. Investigation report in Case No. 55 of 2012 was received by the Commission on 1st April, 2012. Since, the issues and findings of the DG are almost similar in the cases pending before the Commission, the findings of the DG have been recorded simultaneously in this order. The differences, however, in the DG's findings have been mentioned at appropriate places.

4.3 The DG identified two major issues, i.e. firstly, whether there is a case of dominance as per the provisions of the Act; and secondly, whether the Opposite Party engaged itself in practices which may be said to be abusive and against the interest of consumers in contravention of the provisions of the Act. The findings of the DG with respect to both these issues are elucidated in the following paragraphs.

4.4 At the outset, the DG noted that even though the Buyer's Agreements referred in the informations in context of alleged imposition of anti-competitive conditions were executed prior to 20th May, 2009, the effects of those Buyer's Agreements in terms of cancellation of apartments, forfeiture of amounts etc. were still continuing and as such the same were liable for examination under the provisions of Section 4 of the Act.

4.5 To identify the dominance of the Opposite Party, the DG determined the relevant market taking into consideration the relevant product market and relevant geographic market, considering the factors mentioned in Sections 19(6) and 19(7) of the Act.

4.6 In the main investigation report in Case Nos. 13 & 21 of 2010, the DG identified the relevant product market to be the market for 'services provided by developers/ builders for construction of high-end residential buildings'. The DG opined that since the residential units being considered in those cases were not small or low priced dwelling units and were in the price range of Rs. 40-60 lacs, they can be categorised as high-end. It was further observed by the DG that even if the prices of these residential units are increased by around 10 per cent , the prospective buyers would not settle for other available options/substitutes, especially houses falling below the price bracket of Rs. 40-60 lacs. Further, the DG identified the 'territory of Gurgaon' as the relevant geographic market.

4.7 Pursuant to the Commission's directions under Section 26(8) of the Act, the DG submitted a supplementary investigation report wherein the DG opined that the relevant market in Case Nos. 13 & 21 of 2010 would be market for 'services provided by developers/builders in respect of residential building apartments ranging between 40 to 60 lacs to the customers in Gurgaon'.

4.8 While determining the relevant market in Case No. 55 of 2012, the DG noted that though price is one of the criteria for making a purchase decision, there are various other external and internal conditions attached to a particular residential project which a buyer takes into account before buying a particular apartment/residential unit in a project. The DG, thus, delineated the market for 'provision of services for development of residential apartments in Gurgaon' as the relevant market.

4.9 Since the conclusions of the DG with regard to assessment of dominance and abuse of dominant position are similar in all the cases, for the sake of brevity, those conclusions are reproduced simultaneously in the following paragraphs and are not repeated.

Analysis of Dominance

4.10 The DG analysed the Buyers Agreements executed between the Opposite Party and the respective Informants. As per the annual reports of DLF Limited, Opposite Party in Case No. 55 of 2012 and Opposite Party in Case Nos. 13 & 21 of 2010 are its subsidiaries. The DG found that the three entities fall within the definition of 'group' as defined under Section 5 of the Act. Since, they were all engaged in the development of residential units in the real estate market, their entire market share was considered by the DG while assessing dominance of the Opposite Party/Opposite Party Group. For assessing the dominance of the Opposite Party, the DG analyzed the factors laid down under Section 19(4) of the Act.

4.11 To determine the market share, DG relied upon the claims made by DLF in its Red Herring Prospectus dated 25th May, 2007, Annual Report for 2009 and data obtained from Centre for Monitoring Indian Economy ('CMIE') for the month of April, 2010. Market share of the Opposite Party Group was found to be the highest in India among top 84 companies, indicating that it is undoubtedly the market leader in terms of sales and market share. To assess the size and resources of Opposite Party Group, DG noted that Opposite Party has a sizeable presence across key cities like Delhi-NCR, Mumbai, Bangalore, Chennai, Kolkata, Chandigarh etc. and a clear market leadership in different real estate segments like commercial, retail and lifestyle/premium apartments. Figures from CMIE regarding Gross Fixed Assets and Capital were also considered and it was found that Opposite Party Group have 69 per cent gross fixed assets and 45 per cent capital compared to other players. Further, as per Opposite Party's own representation made to the Applicant buyers, it has extensive land reserves amounting to 10,255 acres, with 51 per cent of land reserves in NCR and land reserves in Kolkata, Goa, Maharashtra, Bangalore etc. Opposite Party was also found to be announcing developable area of 574 million square feet, with 46 million square feet under construction. To find out the size and importance of competitors of Opposite Party and its economic power, DG analyzed figures from CMIE pertaining to net income, profits after tax and observed that as of March, 2009, Opposite Party was enjoying about 40 per cent share in terms of net income and 76 per cent in terms of Profit after Tax from 112 companies.

4.12 Opposite Party has a gigantic asset base, enormous cash profits and net profit, compared to its competitors. Further, the joint ventures and partnerships entered into by the Opposite Party with other groups for development of real estate projects also add to the Opposite Party's strength.

4.13 DG noted that the Opposite Party had developed 22 urban colonies, with development projects across 32 cities. It had about 300 subsidiaries through which it conducts its business effectively. In spite of the presence of other real estate developers in Gurgaon, Opposite Party was the preferred choice of buyers due to its early mover advantage. DG emphasized that the dominance of the Opposite Party is due to its market share, size, resources and economic power (as discussed above). Taking into account the abovementioned factors, the DG concluded that the Opposite Party, along with its group entities, is enjoying a position of dominance in terms of Section 4 of the Act.

Analysis of Abuse of Dominance

4.14 To analyse whether Opposite Party was abusing its dominance, the DG investigated various allegations posed by the Informants. The investigation pointed out certain facts and events, which are briefly discussed in the following paragraphs.

4.15 The DG noted that the booking amount was collected from the Applicants in February 2008 and Buyer's Agreements was sent to Informants in December, 2008. However, the construction did not commence before May, 2009 and foundation work was completed only by February, 2010. Therefore, the DG found merit in the allegation raised by the Informants regarding delay in construction. The DG further found that when booking amounts were collected by the Opposite Party, none of the approvals were in place. The Informants submitted their applications in February, 2008 for apartments in Sector 90 but were allotted apartments in Sector 91, approvals for which were obtained on 28th March, 2008.

4.16 It was further found that the Government of India constituted a State level Expert Appraisal Committee (SEAC) for considering environmental clearance projects (category B) in 2006. The DG perused the minutes of the meetings of the Committee held on 27th November, 2008 and 28th November, 2008 according to which it was clear that booking amounts were collected without any valid license in place. The environmental clearance was accorded to the Opposite Party on 5th February, 2009. Therefore, the DG concluded that the Opposite Party collected considerable amounts even when zonal plans, town planning, environmental clearances were not obtained by it.

4.17 The DG further noted from the letter of the Opposite Party dated 26th May, 2009 that the project consisted of only 20 floors. However, a plan for 23 floors was submitted to SEAC in its 12th meeting in February, 2009 which shows how the Opposite Party was acting in an arbitrary manner without providing any information to the buyers regarding exact number of floors. The DG further noted that the Opposite Party also misrepresented about actual time schedule for completion and possession of the apartments/units.

4.18 The DG also noted that the Opposite Party imposed unfair financial pressure on the Informants by subjecting them to heavy penalties in case of defaults. The Opposite Party readjusted the super area in such a manner so as to put excess financial burden on the buyers in the form of additional PDC/IDC charges on account of modified super area.

4.19 The DG also observed that the terms of the Buyer's Agreement were vague as regards the number of floors that would be finally built. Further, when the apartment buyers raised issues with the Opposite Party regarding various misrepresentations, they were threatened with cancellation of allotment. Opposite Party cancelled the allotment of certain buyers and even forfeited their booking amount of about Rs. 7 lacs each.

4.20 The DG analysed the various terms and conditions imposed by the Opposite Party *vide* the Buyer's Agreement. DG concluded that the terms and conditions of Buyers Agreements were loaded heavily in favour of the Opposite Party. The terms and conditions highlighted by the DG in its investigation reports are briefly discussed in the following paragraphs.

4.21 As per Representations B, C and G, the right of the buyers on future changes, alterations, construction etc. were taken away and buyers could not investigate into title deeds of the land. As per Clause 1.15 and 1.16, there was no determination of

preferential location charges, super area, carpet area etc. and buyers were not even aware of final carpet area of apartment units and final price, leading to complete information asymmetry. Clauses 3 and 4 provided the Opposite Party with discretion to forfeit earnest money when the buyer wants to cancel the allotment. Further, as per Clauses 9 and 10, no right had been provided to buyers to raise any objection towards alterations/modifications. As regards Clause 10.3, it was provided that if Opposite Party is unable to deliver possession within 36 months, buyer can give a 90 days' notice for termination of the Buyer's Agreement. In such an event, the Opposite Party shall be obligated to refund the amount only after the apartment has been sold by the Opposite Party.

4.22 As regards Clause 11 of the schedule for possession of the apartment, there was no obligation on the Opposite Party to deliver possession within a definite time period. Clause 33 gave absolute right to the Opposite Party to make additions/alterations without clarifying the extent of such additions or alterations. Clauses 34 and 35 provided the Opposite Party the right to raise finance and mortgage at its will. As per Clause 43 of Buyer's Agreement, in the event of abandonment of Agreement due to lack of approvals by Government, entire liability could be shifted on the buyers even to the extent of utilizing application money for fighting cases in the court. The dispute resolution by way of arbitration as per Clause 62 of the agreement provided that arbitration proceedings were to be held within DLF city and Opposite Party had absolute discretion to appoint sole Arbitrator, including any of its employees or advocate, to which buyers could not disagree at a later stage and all decisions of such Arbitrator shall be final and binding upon the parties.

4.23 In view of the abovesaid terms and conditions enshrined in the Buyer's Agreement, the DG concluded that the Opposite Party abused its dominant position by way of imposing unfair terms and conditions. This, as per the DG, amounted to contravention of Section 4(2)(a) of the Act.

5. Reply/Objections

Reply/Objections of the Informants (Case Nos. 13 & 21 of 2010 and 55 of 2012) in response to the DG Report

5.1 The Informants in all three cases were given an opportunity to place their objections to the DG report on record. However, none of the Informants appeared for oral submission or submitted their written submission in the cases before the Commission.

Reply/Objections of the Opposite Party in response to the DG Report

5.2 The Opposite Party filed various written submissions and made oral arguments through their Counsels on different dates during the pendency of this case before the Commission. The crux of the submissions has been summed up in the following paragraphs.

5.3 It was averred that the dispute in question arose out of a contract entered into between two parties and was purely commercial in nature without any competition issues. Therefore, the Informants ought to have approached the appropriate forum for suitable remedies under the Indian Contract Act, 1872 or other applicable laws for breach of terms and conditions. It was urged that the Buyer's Agreements are voluntary, conscious, legally binding agreements executed between two or more competent parties without any element of coercion. The conditions as set out in the Buyer's Agreement were already set out in the terms and conditions of the 'booking application', and the buyers had made the bookings with full knowledge thereof.

5.4 Further, on the question of jurisdiction of the Commission, the Opposite Party argued that terms/Clauses of the Buyer's Agreement's were agreed between the parties by way of an agreement in 2008, that is, prior to coming into force of Sections 4 of the Act. It was urged that since the alleged Buyer's Agreements imposed conditions on the parties prior to 2009, therefore, the conditions *per se* and the actions in pursuance thereof, ought to escape the scrutiny of Section 4 of the Act. It was pressed upon that this point has been upheld by the Competition Appellate Tribunal in its order dated May 19, 2014 while disposing of the appeal against the order passed by the Commission in *Belaire Owners' Association v. DLF Limited, HUDA & Ors.*[1] (Case No. 19 of 2010) (hereinafter referred to as the 'Belaire case').

5.5 Opposite Party submitted that the alleged anti-competitive terms and conditions of the Buyer's Agreement are incorporated by other real estate developers also and such Clauses are incorporated as per 'Industry Practice' and do not amount to abuse of dominant position. It was also argued that the Buyer's Agreements do not constitute "sale of service" but relate to "sale of apartments" and as such Section 4 of the Act is not applicable in the instant case.

5.6 It was averred that the DG investigation is flawed with respect to determination of relevant market in so far as different relevant market definitions have been proposed in main DG report and supplementary report in Case Nos. 13 & 21 of 2010 and in Case No. 55 of 2012.

5.7 The Opposite Party submitted that the DG in the main investigation report arrived at inconceivable findings that the relevant market was 'services provided by the developers/builders for construction of high end building carried out in the Gurgaon'. The categorization of residential units ranging between INR 40 - 60 lacs as 'high-end' was flawed and wholly incorrect, primarily because in the *Belaire Owners' Association v. DLF Limited, HUDA & Ors.*, Case No. 19 of 2010, the Hon'ble Commission had already held that apartments in the range of INR 1.5-2.5 Crores are 'high-end'. Therefore, if the said relevant market definition were to be accepted, it would result in incongruous and opposing situations wherein the apartments in the Project (INR 40—60 lacs) would form part of the same relevant market which includes apartments in the range of INR 1.5-2.5 Crores.

5.8 The Opposite Party criticised the relevant geographic market determined by the DG by stating that apartments in different locations and segments compete with each other and keeping in view the likely appreciation in value, all such apartments would fall in the same segment. A customer desirous of buying a residential apartment would look for various alternative locations and not necessarily Gurgaon. Keeping this important factor which determines the choice of the customer, the relevant market cannot be confined only to Gurgaon and it would be at least extended to NCR, including Delhi, Noida, Greater Noida, Ghaziabad, Faridabad etc.

5.9 It was submitted that the relevant market delineated by the DG in the supplementary investigation report i.e. market for services provided by the developer/builder in respect of residential building apartments ranging between Rs. 40-60 lacs to the consumer in Gurgaon' is even more inappropriate and leads to a completely incongruous conclusion. All residential units ought to form part of the relevant product market and the Commission itself rejected the arbitrary market definitions such as 'high-end/super-high/luxury' etc. in its own orders. The Opposite Party cited

1 Ed.: MANU/CO/0044/2011: 2011Com PLR 239 (CCI): [2011] 104CLA398 (CCI): [2011] 109 SCL 655 (CCI)

M/s. Moran Plantation Pvt. Ltd. & Ors. v. M/s. Ambience Private Limited & Ors.[2], Case Nos. 81, 82 and 83 of 2013, where the Commission observed that the "[i]n the said relevant market, DLF was found to be in a dominant position. It appears that the informants by using the phrase 'very high end' are seeking to delineate the relevant market in a very narrow, abstract and artificial manner". Citing the Commission's order in Case Nos. 81, 82 and 83 of 2013, the Opposite Party stated that the DG in the present case has in fact gone against the Hon'ble Commission's own order by defining the relevant market in the most arbitrary and narrow manner, to ensure that the Opposite Party is found dominant in the said relevant market.

5.10 Further, the Opposite Party cited the order passed by the Hon'ble Commission in *DGCOM Buyers & Owners Associations, Chennai v. M/s. DLF Ltd., New Delhi & M/s. DLF Southern Homes Pvt. Ltd., Chennai*[3], Case No. 29 of 2012 dated 27 November 2012 whereby the Commission held as follows.

> "In line with its previous decisions in the real estate sector and keeping in mind the provisions of Sections 19(6) and 19(7) of the Act, the Commission is of the view that the relevant product market in this case is 'the provision of services for development and sale of residential space'. Therefore, the Informant's contention of the geographic market being the OMR IT corridor is not acceptable based upon the factors of demand and supply substitutability, the relevant geographic area in this case would be the area comprising the entire geographic area of Chennai city."

5.11 It was further submitted that the DG's investigation is flawed in this aspect, since it has failed to consider the proper relevant market, and wrongly assessed dominance in an incorrectly defined market. There is no material placed on record to corroborate the findings of the DG and both investigation reports should be rejected on grounds of faulty assessment of the relevant market itself. It was also urged that DG assessed the dominance of Opposite Party in an utmost arbitrary manner and based his assessment of dominance on completely irrelevant data published by the Centre for Monitoring Indian Economy data (CMIE Report/CMIE data). CMIE data cannot be relied upon as the share of the Opposite Party as well as its competitors has been calculated on an all India basis which does not reveal the Opposite Party's market share in NCR or even in Gurgaon. Further, the figures pertained to a period prior to 20th May, 2009 which cannot be treated as a reliable for determination of present market position of Opposite Party. Further, the CMIE data provides for total sales figures of all enlisted companies in the housing sector which have absolutely no bearing in the determination of dominance in the relevant market of high-end residential buildings. CMIE data does not account for several large companies operating in the real estate sector and does not reflect the market shares of bodies such as the Delhi Development Authority, the Haryana Development Authority etc. and DG chose a set of 11 companies in the most random order to conclude Opposite Party's dominance in the relevant market.

5.12 On the issue of dominance, the Opposite Party submitted that it could not have acted independently of its competitors. There were numerous developers who launched residential projects during the relevant period which have not been considered by DG and findings of the DG are incorrect to that extent.

5.13 The Opposite Party contended that ideally the DG ought to have considered the new market players also, before deducing the dominance of a particular player in the

2 Ed.: MANU/CO/0027/2014

3 Ed.: MANU/CO/0103/2012: 2012Com PLR 1164 (CCI): [2013] 117 SCL 79 (CCI)

market. It was suggested that numerous new developers have entered the market in the recent past such as IREO, Ramaprastha, Orris Infrastructure, Vatika, Sare, MGF, Ansal, M3M, etc. and as such there were no entry barriers prevalent in the market.

5.14 Opposite Party further contended that the delineation of the relevant market carried out by the DG in the supplementary DG Report is also incorrect since details of all builders in Gurgaon have not been analysed and the DG has picked only certain builders. Further, the Opposite Party argued that the DG failed to consider the material placed on record by the Opposite Party, particularly the report compiled by Knight Frank and Prop Equity, Goldman Sachs Research dated January, 2009 which clearly highlights the number of players in the real estate market in Gurgaon. It was averred that by resorting to relevant market based on pricing of a particular project, the DG has committed a grave error.

5.15 Opposite Party also challenged the acceptance of New Town Heights Home Owners Association's (hereinafter referred to as 'NTHHOA/Intervener') application whereby the Commission allowed the Intervener to intervene in the matter. The Opposite Party urged that by allowing the Intervener at such a late stage would give rise to new allegations which will remain unsubstantiated and uncorroborated, especially in relation to Opposite Party's conduct, subsequent to 20th May, 2009 as mentioned in the written submissions dated 14th July, 2014 filed by the Intervener. Intervener *vide* its submissions dated 9th September, 2014 placed on record certain new agreements which were executed after coming into force of the Act in relation to the same project. The Opposite Party objected to such new agreements being placed on record contending that the same were not the subject matter of the present matter and the matter only related to booking applications executed prior to 20th May, 2009 as provided in the information.

5.16 In relation to construction of additional floors by the Opposite Party, it was submitted that there has been absolutely no increase in the number of floors in the towers situated in Sectors 86 and 91 and rather, there has been a decrease in number of floors initially planned. It was submitted that it was only in Sector 90 that a few floors in certain towers were increased, i.e. an increase of 6 floors each in Towers M and N and 1 floor each in Towers P, Q and R. The Opposite Party contended that the actual number of final units (3140) was actually lesser than the apartments contemplated at the time of launch which was 3149.

5.17 The Opposite Party further submitted that the increase in the number of floors was directly proportionate to an increase in the total area of the land and the Intervener has incorrectly alleged that the super area of the apartment has been drastically changed. It was mentioned that considering the nature of the product, it is not practically possible for any developer, including the Opposite Party, to clarify the exact area of each apartment and the exact share of each allottee in the common areas, prior to the actual construction.

5.18 It was contended that the Intervener's allegations regarding delay in handing over the possession of the apartments are entirely misplaced, since it ignored the procedure for transferring possession to buyers and are based on an entirely incorrect appreciation of the actual factual position regarding the status of completion of the apartments. Upon completion of construction, the developer applies for occupation certificate. Once occupation certificate is received from relevant authority and all due payments are received from buyers, the developer issues a possession letter to buyers inviting them to take over the possession of the apartments. Finally, upon receipt of the possession letter, possession is actually taken over by the concerned buyers.

5.19 It was urged that in the present case, Opposite Party had sold most of the units in the three New Towns Heights' projects and issued possession letters to 2426 buyers, of whom 2257 buyers have taken over possession of their apartments. It was submitted that only 14 apartments had been cancelled as per Clause 8 of the Agreement, the reason being failure of the buyers to pay amounts due by them to the Opposite Party.

5.20 The Opposite Party further denied all allegations posed by the Informants with regard to unfair financial pressure, unreasonable demands towards Preferential Location Charges (PLC) charges, heavy charges being imposed for delays, unfair demands on account of increased super area etc.

5.21 On the contrary, the Opposite Party illustrated various additional benefits which were offered by it to its allottees. Based on the preceding arguments and submissions, the Opposite Party prayed that the findings of the DG be rejected in so far as they relate to the Opposite Party.

Comments of NTHHOA/Intervener on the DG Report

5.22 During the course of proceedings, the Intervener filed an application dated 4th April, 2013 seeking to be impleaded in the proceedings of the cases before the Commission urging that its member buyers are identically situated as the Informant in Case No. 13 of 2010 and have suffered due to the one-sided abusive Clauses favouring the Opposite Party while signing their respective Apartment Buyers' Agreement with the Opposite Party.

5.23 The Intervener alleged that it has been registered on 4th April, 2012 under the Societies Registration Act, 1860 and its aims and objects were to *inter alia* provide welfare schemes, all kinds of services to the "Residents" and "Occupants" of DLF New Town Heights, Sectors 86, 90 and 91 situated in Gurgaon, Haryana. The Intervener stated that in the year 2008 the Opposite Party launched its Group Housing Project under the name of DLF New Town Height to be constructed in Sectors 90, 91 & 86 having three types of apartments (Type I, Type II and Type III) along with some Town Houses and independent floors. Members of the Intervener applied for allotments by paying a ten per cent booking amount. The moment the booking was paid, the Opposite Party started extracting money by imposing payment schedules on the buyers and by the time their respective Apartment Buyers' Agreement were sent, Crores of rupees had already been paid by the buyers.

5.24 The Opposite Party devised a standard form Apartment Buyer's Agreement and any person desirous of buying the Apartment was required to accept the terms and conditions of such agreement in totality, irrespective of howsoever onerous and one-sided the Clauses of the Apartment Buyer's Agreement were. The Intervener contended that a cursory look at the terms of their respective Apartment Buyers' Agreement showed that buyers had no bargaining power and there was no scope of discussion or variation in the terms of such Agreement. The Intervener highlighted that the Opposite Party neither while announcing the Project nor while executing such Agreement had the Layout Plans approved by the Director, Town & Country Planning, Haryana, Chandigarh. Buyers were not allowed to inspect the site, nor were they provided with any details as has been falsely mentioned under Clause g.

5.25 *vide* Clauses 1.1 and 1.2, buyers were required to pay sale price for the super area of the apartment and for undivided proportionate share in the land on which the apartment is located. As per Clause 8, while time has been made essence with respect to allottee's obligations to pay the price and perform all other obligations under their respective Apartment Buyers' Agreement, the Opposite Party has

conveniently relieved itself by not making time as essence for completion in fulfilling its obligations, more particularly, handing over the physical possession of the apartment and completion certificate to the allottee.

5.26 Further, as the Buyer's Agreement has been executed without any approval/ sanction and/or clearance by the concerned authorities, the Intervener expressed its apprehensions that in future, the buyers shall be at the mercy of the Opposite Party who reserved with itself the right not only to alter/delete/modify building plan, floor plan, but to even go to the extent of increasing the number of floors and/ or number of apartments. The Opposite Party had also unilaterally reserved with itself the right to mortgage/create lien and thereby raise finance/loan. In case, the Opposite Party is not able to repay or liquidate the finance/loan, the Allottee will be the direct sufferer. The Commission by its order dated 30th May, 2013 allowed the application of Intervener.

5.27 The Intervener Association filed its submissions on 22nd August, 2013, supplementing findings and conclusion reached by the DG as regards the abuse of dominance by the Opposite Party. As regards the relevant product market, the Intervener submitted as under:

> "Although the Learned DG has held the DLF dominant in Gurgaon, which included New Gurgaon in the product market of apartments ranging from Rs. 40 lac to Rs. 60 lac, the dominance of DLF only in New Gurgaon is more emphatic and on much on wider scale than that in entire Gurgaon. Analysis of the Learned DG at pages 48 and 49 amply demonstrates that the dominance of DLF is not restricted only to the range of Rs. 40 lac to Rs. 60 lac but extends to apartments priced above Rs. 60 lac and, therefore, the Learned DG Report lends support that the relevant product market in the present case is services provided by developers builders in respect of residential building apartments ranging between Rs. 40 to Rs. 90 lac to the consumers."

5.28 The Intervener supported the findings of the DG and reiterated the allegations raised in the Information which are not repeated here for the sake of brevity. The Intervener had submitted that the investigation report of the DG is well reasoned and fully justified. The dominance of DLF further gets magnified in the area of New Gurgaon, which is approximately 20 km away from Gurgaon and in close proximity to Manesar. It was contended that New Gurgaon lacks basic infrastructure and connectivity by roads. It was further contended that DLF is one of the pioneers in New Gurgaon as New Town Heights is one of the starting projects of DLF. This fact is further substantiated by the fact that DLF was able to sell its apartments in New Gurgaon on the very day of launch, without any basic infrastructure or road connectivity in place.

5.29 The Intervener Association also provided the list of 31 Buyers who entered into their respective Apartment Buyers' Agreement in 2010, 2011, and 2013. All Buyers' Agreements were almost identically worded as the Buyers' Agreements executed by the Opposite Party with its buyers prior to 20th May, 2009. The buyers had no access to any document, the Buyers' Agreements, sanction plans, etc. at the time of booking the apartment and it was only due to the brand image and market dominance of the Opposite Party that the buyers booked their apartments and later found themselves entrapped by the one sided and abusive terms and conditions of the Buyer's Agreement.

6. Issues and Analysis

6.1 On a perusal of the DG report and the replies/objections filed by the Intervener and Opposite Party and other material available on record, the Commission is of the opinion that the following issues require determination in this matter:

(1) Whether the Commission has jurisdiction to analyze the conduct of the Opposite Party emanating from the Buyers' Agreement which have been alleged to be one-sided and hence, abusive in the present case?

(2) Whether the Opposite Party has violated the provisions of Section 4 of the Act?

6.2 The abovementioned issues are dealt in detail in the light of the evidence as collected by the DG, the submissions made by the parties and other material placed on record.

Determination of Issue 1 regarding jurisdiction of the Commission

6.3 The issue of jurisdiction was repeatedly raised by the Opposite Party urging that the Commission has no jurisdiction in these cases as the Buyers' Agreements under challenge were entered into prior to 20th May, 2009 i.e. the period when the relevant provisions of the Act, were not in force. It was argued that the provisions of the Act, especially Section 4 of the Act, being prospective in nature cannot be invoked to scrutinize the 'Buyers' Agreements' entered into between the Informants and Opposite Party before the above stated cut-off date. The Opposite Party even relied on the Competition Appellate Tribunal's (COMPAT) order dated 19th May, 2014 (hereinafter referred to as the 'COMPAT's order') to press upon this point. The Counsel of the Opposite Party stated that as per the COMPAT's order , since the concept of 'imposition', 'abuse' or 'dominance' was not present at the time of signing of the 'Buyers' Agreements', the 'Buyers' Agreements' were perfectly valid and non-abusive. Further, it was contended that the conditions which were imposed on the parties/buyers prior to 2009 should not be subjected to the scrutiny of Section 4 of the Act.

6.4 This, in our view, is a completely wrong understanding of the law based on a very selective reading of the COMPAT's order.

6.5 At the outset, it may be noted that Commission is fully cognizant of the legal position that the Act is not retrospective but prospective in nature. However, that does not mean that the fact of execution of an agreement prior to 20th May, 2009 would immunize the conduct of the Opposite Party altogether from the scrutiny of the Act.

6.6 The submissions advanced by the Counsel of the Opposite Party suggest that since the Buyers' Agreements were entered into between the parties prior to 20th May, 2009, the Commission has no jurisdiction to look into them. The Opposite Party has relied on various excerpts of the COMPAT's order to argue that the Commission has no jurisdiction as the terms and conditions were imposed by way of Buyers' Agreements, entered into prior to 20th May, 2009. Commission fails to understand how those excerpts, which are not reproduced herein for the sake of brevity, help the argument of the Opposite Party with respect to jurisdiction. The only logical conclusion/interpretation which stems from the complete reading of COMPAT's order on the issue of jurisdiction is that in the *Belaire's* case the Commission should not have re-written the Clauses of the agreement which were valid when they were entered into. That point being under appeal pending disposal before the Hon'ble Supreme Court, the same is not dilated upon any further in this order. Leaving that aside, the Commission is of the opinion that the COMPAT's order has very categorically confirmed Commission's jurisdiction to look into the conduct of the Opposite Party if such act/conduct is in pursuance of the Clauses enshrined in the agreement but were not contemplated in the same. The following excerpt from the COMPAT's order is useful in this context:

'We therefore, conclude that the CCI had the jurisdiction, but that is not the be-all and end-all of the matter. Since, the buyer/allottees have alleged breach of Section 4 of the Act, not only on account of the various Clauses in the ABA, but also on some other counts. In respect of all the three residential apartments, namely - Belaire, Park Place and Magnolia, the buyers/allottees complained of imposition of unfair and discriminatory conditions by the action of the Appellant against themselves and this imposition was stated to be after 20th May, 2009. If that is so, then the CCI certainly has the duty and jurisdiction to take into account such impositions. Therefore, even if, we do not find any justification on the part of CCI to look into and consider the ABAs, which were dated way back in 2006/2007, we do feel that the complaints about the breach of Section 4 of the Act could be and were rightly entertained by the CCI, particularly of those impositions, which were post 20th May, 2009.' (Para 76)

6.7 In view of the foregoing, the Commission is not at all convinced that the only fact that the Agreement was entered into prior to 20th May, 2009 would absolve the Opposite Party of the liabilities which arise because of their conduct post 20th May, 2009.

6.8 Even otherwise, it may be noted that the DG reports clearly point out that even after 20th May, 2009, apartment units were sold and agreements were executed with certain apartment buyers as the advertisements continued to come in the newspapers for sale of such apartments. The Opposite Party has failed to bring any material on record to contradict this finding. The only argument which the Opposite Party kept on pressing during the proceedings was that the Buyers' Agreements in question i.e. those Agreements which were entered with the Informants in the present cases belong to a period prior to 20th May, 2009. It was never the case of the Opposite Party that post 2009, they stopped entering into agreements of the same nature and with similar Clauses/conditions which were previously entered into with the present Informants. Looking at the broader spirit of the Act and the duty that has been cast on the Commission by the legislature, it will be inappropriate to decide every case qua the Informant only. The Informant is but one of the mediums through which the Commission becomes aware of the distortion of competition or market irregularities. To say that the investigation and analysis of the Commission should be restricted to the conduct of Opposite Party towards a particular Informant/consumer would hamper the very objective and spirit of the Act. In addition to what has already been stated, it may also be noted that the Buyers' Agreements placed on record by the Intervener were entered into post 20th May, 2009. Though the Opposite Party challenged the reliance on such Buyers' Agreements stating that the same were not investigated by the DG, the Commission perceives no harm or injury to justice in taking them on record.

6.9 In view of the foregoing, the Commission is of the opinion that it has jurisdiction in the present cases before it. The Agreements placed on record as well as the acts/practices which are under challenge in the present proceeding squarely fall within the jurisdiction of the Commission and therefore, the Commission has no hesitation in proceeding to discuss the cases on merits.

6.10 Apart from the objection on jurisdiction, the Opposite Party also raised other preliminary objections to argue that the Informants have defaulted in law by coming to a wrong forum. It was pressed that the dispute is contractual in nature and the Informants could have approached the appropriate forum to claim remedies for breach of contract under the Indian Contracts Act, 1872. The Commission, however,

is not convinced with the assertions made by the Opposite Party. The Opposite Party's argument that the Informants could have approached an appropriate forum for breach of contract is misplaced as this is not a case of breach of contract. The case does not entail examination of the breach of the terms/conditions specified in the contract but the way in which the Opposite Party has conducted itself while dealing with the buyers. The allegations made in the present cases squarely raise competition concern because the kind of conditions which were imposed on the buyers/allottees and the way they have been executed by the Opposite Party was alleged to be an expression of abuse.

6.11 Similarly, the argument of the Opposite Party with regard to 'sale of apartment' not being a good or service is misplaced. The same argument was made by the Opposite Party in the *Belaire's* case and at the appellate stage before COMPAT. The Commission, in *Belaire's* case, relied on various judgments of the Hon'ble Supreme Court to conclude that housing activities undertaken by development authorities are service and are covered within the definition of service given in Section 2(o) of the Consumer Protection Act, 1986. The Commission held that the rationale given by the Supreme Court in those cases which were referred in the *Belaire's* case were applicable to the facts of that case, more so when considering the fact that the definitions of 'consumer' given in Section 2(f) and 'service' in Section 2(u) of the Act are wider than the definitions of these terms given under the Consumer Protection Act, 1986. The Commission further opined that definition of the term 'service' as provided under Section 2(u) of the Act makes it abundantly clear that the activities of DLF in context of the present matter squarely fall within the ambit of term 'service'. It may also be pointed here that the COMPAT's order affirmed this holding. The COMPAT, while dealing with this issue held as under:

> 'When the ABA was executed at that time, there was a commitment on the part of the Appellant to give a particular apartment to a particular allottee and it was to be constructed exactly as per the instructions of the allottees. If this was so, there was no question of the Appellant constructing something in its own interest irrespective of the interest of the allottees. The interest of the allottee was a paramount affair. The allottee could suggest some minor changes and the Appellant was bound to construct the apartment in that fashion and then to handover the same. It must also be remembered that the Appellant had charged huge amounts before and at the time of entering into the ABA. Therefore, it is really a travesty on the part of the Appellant to argue that it was not providing any service. If it was not providing any service, it was not bound to listen to the instructions of the allottees about the manner in which the final apartment was to be constructed including its interiors etc. In our opinion, the CCI was absolutely correct in holding that the Appellant was providing service relating to construction and it amounted to service in the sphere of real estate business and as such on that count the CCI had the jurisdiction to consider the affect of this service in respect of breach of Section 4 of the Act.' (Para 52)

6.12 In view of the aforesaid, it is clear that the meaning of 'service' as envisaged under the Act is of very wide nature and is not exhaustive in application. It is not disputed that the Opposite Party carries out the activity of constructing apartments intended for sale to the potential consumers after developing the land. Therefore, it is clear that this kind of activity is a provision of service in connection with business of commercial matters such as real estate or construction. Hence, the contention raised on behalf of the Opposite Party that sale of an apartment is not covered under the definition of service is wholly misplaced and liable to be rejected.

Determination of Issue 2 regarding contravention of the provisions of Section 4 of the Act

6.13 The alleged contraventions in the cases before the Commission pertain to abuse of dominant position under Section 4 of the Act. Section 4 of the Act prescribes abusive conduct by a dominant enterprise. The position of dominance of an enterprise is, usually, with context to a relevant market within which such an enterprise is alleged to be abusing its position.

Determination of Relevant Market

6.14 Before determining the relevant market in the present case, the Commission considers it necessary to discuss the purpose that mandates determination of relevant market in cases pertaining to abuse of dominant position. It has been held by this Commission in various cases, and by various other competition authorities around the world, that defining relevant market is the first step towards assessing the dominance of a market player whose conduct has been alleged to be abusive. The contours of relevant market guide the competition authority, both in terms of product/service and geographic reach, as to what competitive constraints are faced by such market player. Relevant market has two facets—relevant product market and relevant geographic market. The relevant product market delineation classifies all those products/services which act as competitive constraints to keep the conduct of market players under check. Similarly, relevant geographic market defines the market within the territorial boundaries where the conditions of competition for demand and supply are distinctly homogenous. The competitors present within the relevant market, by exerting pressure of providing cheaper or better quality competitive products, prevent other players from acting independently of the competitive forces. It is from this viewpoint that the definition of relevant market gains importance as it helps in reaching a conclusion with respect to market power or dominant position of a particular market player in comparison to the other players to understand its capability of operating independent of its competitors and consumers in the relevant market. Such relevant market can be narrowed or broadened depending upon the facts and circumstances of each case. A relevant market defined under one set of circumstances may change with changes in those circumstances. This necessarily implies that the concept of relevant market definition is a fluid concept. Depending upon the facts and circumstances of each and every case, various alternative market definitions can be employed in apparently similar, yet different, circumstances.

6.15 The present cases before the Commission constitute a perfect illustration of what has been stated in the preceding paragraph. The DG has provided three different relevant product market definitions, though the relevant geographic market in all the three cases has been found to be the 'geographic region of Gurgaon'. In Case Nos. 13 & 21 of 2010, the DG delineated the relevant product market as the market for 'services provided by the developers/builders for construction of high end buildings'. In the Supplementary DG report, the relevant market was narrowed down to market for 'services provided by developers/builders in respect of residential building apartments ranging between 40 to 60 lacs to the customers'. Notably, in both these relevant product markets, the DG found the Opposite Party to be dominant in the region of Gurgaon.

6.16 In Case No. 55 of 2012, the DG delineated the relevant market to be the market for 'provision of services for development of residential apartments'. In this market also, the DG found the Opposite Party to be dominant in the region of Gurgaon.

6.17 The Opposite Party has challenged all the abovestated relevant markets, with regard to both relevant product as well as geographic market. On the relevant geographic market, it has been contended that the DG has failed to provide any cogent data to show why a person looking for a residential home/apartment would prefer Gurgaon over other areas of NCR or Northern India, generally. By taking that argument, the Opposite Party has suggested that the relevant geographic market in the present case should be taken at 'territory of NCR'. With regard to relevant product market, the Opposite Party has proposed two major modifications—firstly, the relevant product market should not be restricted to high-end or price of the apartment; and secondly, such market should also include the availability of similar apartments in the secondary market. Accordingly, the Opposite Party contended that the relevant market in all the three cases should be 'the sale of residential units in NCR'.

6.18 It has already been stated that the DG has defined the relevant product market in three different ways in the cases before the Commission. In Case Nos. 13 & 21 of 2010, the DG delineated the relevant product market as the market for 'services provided by the developers/builders for construction of high end buildings'. In the Supplementary DG report, the relevant product market was narrowed down to market for 'services provided by developers/builders in respect of residential building apartments ranging between 40 to 60 lacs to the customers'. In Case No. 55 of 2012, the DG found the relevant product market to be the market for 'provision of services for development of residential apartments'. In all these markets, however, DG's conclusion on dominance remained the same i.e. the DG found the Opposite Party to be dominant in all these sub-segmented relevant product markets within the geographic region of Gurgaon. Moreover, in the '*Belaire* case' also, the Commission found DLF to be dominant in the market for 'services of developer/builder in respect of high-end residential accommodation in Gurgaon'. The COMPAT's order confirmed this finding of the Commission while disposing of the appeal filed in the '*Belaire* case'.

6.19 The preceding observations make it clear that, at least with regard to present case, the conclusion on dominance of the Opposite Party would not change irrespective of which relevant market is accepted by the Commission. The Commission has perused each of these relevant product market definitions proposed by the DG and finds no infirmity with regard to their correctness or evidence relied upon.

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.

6.21 One of the objections raised by the Opposite Party in respect of relevant product market is exclusion of similar apartments in the secondary market. The Commission has already discarded this argument in the '*Belaire* case' as reproduced in the following paragraph:

> 'Similarly, the argument that apartments are also sold by initial allottees and that there is a thriving "secondary" market, also does not carry weight in the relevant market under consideration. Every asset, including real estate, has a value which

either erodes or appreciates with time. Depending upon the preference and the circumstances, the owner may like to retain it or dispose of at an opportune time. 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. Therefore, this argument also deserves to be rejected.' (Para 12.35)

6.22 Therefore, the Commission is of the view that precise definition of relevant product market is not required in the cases before us. For the purposes of the present cases, the Commission considers it appropriate to delineate the relevant product market as the market for ' the provision of services for development/sale of residential apartments'.

6.23 With regard to the relevant geographic market, the Commission has no hesitation in accepting the DG's conclusion and rejecting the Opposite Party's proposition. Accordingly, the Commission is of the view that the relevant geographic market in the cases before the Commission would be 'geographic region of Gurgaon'. 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 five per cent 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 19th May, 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'. Therefore, in the present cases before us, the Commission is convinced that 'geographic region of Gurgaon' is the correct relevant geographic market.

6.24 Accordingly, the Commission is of the view that the relevant market in the present cases would be market for 'the provision of services for development/sale of residential apartments in Gurgaon'.

Assessment of Dominance

6.25 Having determined the relevant market to be the market for 'the provision of services for development/sale of residential apartments in Gurgaon', the Commission

will now deal with the assessment of market power/dominance held by the Opposite Party. It has already been pointed earlier that the DG has found the Opposite Party to be dominant in all the relevant markets that were determined in the DG reports submitted in Case Nos. 13 & 21 of 2010 and Case No. 55 of 2012. Further, in the *Belaire's* case, the Commission concurred with the DG's findings and found the Opposite Party to be dominant in the relevant market of 'services of developer/builder in respect of high-end residential accommodation in Gurgaon'. In that case also, the Opposite Party challenged the findings of the DG on the ground of reliance of inaccurate data. The Commission in that case amply clarified that most of the issues raised by the Opposite Party are on account of data limitations, which are inevitable in the real estate business, as there exists no official sectoral statistical estimates applicable for the entire country. The Commission then accepted the DG's conclusions based on the CMIE data stating that it is the most reliable available data.

6.26 The Commission also noted in the above cited case that though, dominant position may be acquired due to several factors, for the purpose of Section 4 of the Act, this position of strength must give the enterprise the ability to operate independently of competitive forces in the relevant market or the ability to affect its competitors or consumers or the relevant market in its favour. It is also of relevance to state here that the COMPAT's order has concurred with the findings of the Commission on this issue without any reservations.

6.27 In the present cases, the DG found that DLF Limited, Opposite Party in Case No. 55 of 2012 and Opposite Party in Case Nos. 13 & 21 of 2010 are part of the same group, the latter two being the subsidiaries of DLF Limited. Since, they are all engaged in the development of residential units in the real estate market, their entire market share was considered by the DG while assessing dominance of the Opposite Party/ Opposite Party Group. After taking into account various factors under Section 19(4) of the Act, the DG concluded that the Opposite Party, along with its group entities, is enjoying a position of dominance in terms of Section 4 of the Act.

6.28 The Commission agrees with the findings of the DG in this regard. The Commission has no doubt in concluding that the strength which the Opposite Party possesses in residential real estate segment in the geographic region of Gurgaon is incomparable. The DG carried out extensive analysis and took into account all the factors laid out under Section 19(4) of the Act. Further, the conclusions of the DG based on CMIE database in respect of about 118 real estate companies across India whereby it was found that the Opposite Party group has about 69 per cent of gross fixed assets and 45 per cent of capital employed cannot be ignored. Further, the land bank of the Opposite Party, information about which was referred to in the Red Hearing Prospectus issued by the Opposite Party itself acknowledges that the Opposite Party group had a total land bank of 10,225 acres out of which 49 per cent is located in Gurgaon alone. Further, the size and resources, the economic strength of the enterprise including commercial advantage over competitors, regulatory barriers in real estate segment, dependence of consumers on the Opposite Party etc. also indicate that the Opposite Party held a dominant position in the relevant market.

6.29 In view of the foregoing, the Commission is of the view that the Opposite Party holds a dominant position in the relevant market.

Assessment of Abuse of Dominant Position

6.30 The allegations in the present cases pertain to imposition of one-sided terms and conditions in the Buyer's Agreement and unfair conduct of the Opposite Party

while executing such one-sided agreements. At the outset it may be mentioned that to a great extent the terms and conditions of the Buyer's Agreement which are the subject matter in the present cases have been raised in respect of other projects which were developed by the Opposite Party in earlier orders e.g. *Belaire* (Case No. 19 of 2010), Park Place (Case No. 18 and others of 2010), Magnolia (Case No. 67 of 2010). In those earlier orders, the Commission held that a cursory glance at the terms and conditions of the Buyer's Agreement showed how heavily loaded the Buyers' Agreement is in favour of the Opposite Party and against the buyer. The Commission further held that under normal market scenario, a seller would be wary of including such one-sided and biased Clauses in its agreements with consumers. The impunity with which these Clauses have been imposed, the total disregard to consumer right that has been displayed in its action of cancelling allotments and forfeiting deposits and the deliberate strategy of obfuscating the terms and keeping buyers in the dark about the eventual shape, size, location etc. of the apartment cannot be termed as fair.

6.31 Same views were echoed in the COMPAT's order which upheld the Commission's finding on abuse. The Informants have alleged that the Opposite Party raised the number of floors without consulting/intimating them. The Opposite Party claimed that increase in the number of floors was in pursuance of Clause 33 of the Buyer's Agreement. While rejecting the similar justification of the Opposite Party in the appeal against the Commission's order in *Belaire* case, the COMPAT's order held as follows:

> 'It was also tried to be argued by Shri Salve that this increase was not objected to by the authorities of Directorate of Town and Country Planning, Haryana and it was within the framework of rules and therefore, no fault could be found with it. We are not here on the legality or validity of the construction, as we are on the impact that it made on the allottees, who did not have even a ghost of idea, as to how many persons they would have to share lifts with or their common area, or for that matter their swimming pool and gymnasium. **The unfairness lies in the sinister silence on the part of the Appellant.** The allottees should not have been kept on the suspended animation on the spacious and broad plea that the Appellant could add additional construction. May be the non-disclosure part thereof, does not strictly come within the mischief of Section 4 of the Act, but when the Appellant had to take an action particularly after the advent of Section 4 of the Act, the Appellant had a duty to disclose that it proposed to increase the exact number of floors and apartments to the extent that it did. The allottees could have taken valid objections, displaying their woes to share the amenities with hoards of other people. After all the allottees had been allured by the promise of the Appellant of all those luxurious facilities, in the absence of which, these apartments could not be termed as luxury apartments. **Therefore, there was a duty on the part of the Appellant to let the allottees know about proposed increase and obtain their views about the same. If the Appellant had a duty not to be unfair, the allottees certainly had a right to expect fair behavior from the Appellant. It is in this sense that we are viewing this unfair action on the part of Appellant, in first not disclosing the number of floors, at least after Section 4 of the Act came on the legal scene and then in proceeding with the construction of additional floors, increasing the number of apartments by 53 per cent in case of Belaire, Park Place and Magnolia.**' (Para 104)
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> (Emphasis supplied)

6.32 The DG has comprehensively examined various allegations regarding the conduct of the Opposite Party in the case in context of the informations filed, namely, commencement of project without sanction/approval of the projects; increase in number of floors in an arbitrary manner, unfair additional demands based on increase of Floor Area Ratio (FAR) and Density Per Acre (DPA); inordinate delay in completion and possession; forfeiture of amounts in case of cancellation; one-sided Clauses in the Buyers' Agreements etc.

Increase in the number of Floors

6.33 The Opposite Party denied this allegation stating that since, additions were made in some towers only, while in other towers the number of floors was decreased; there has actually been a decrease in the floors as compared to what was initially planned. It was also submitted that a total of 3149 apartments were contemplated at the time of the launch and the final number of units was 3140 at the time of filing of the written submissions. The Commission is not impressed by this argument of the Opposite Party. The figure of 3140 apartments was a variable figure considering that the construction of all the towers was not yet complete. The way the Opposite Party changed its construction plans without giving any option to the apartment buyers is itself abusive. Just because there was increase in some towers and decrease in other towers does not balance the effect which the apartment buyer has to go through. May be in some towers the Opposite Party has not yet even constructed the initially declared number of floors but for the apartment buyers who have booked apartment in the towers where the number of floors have increased, the conduct of the Opposite Party is unfair.

6.34 The Opposite Party also stated that Clause No. 33 of the Buyers' Agreement empowers it to change the number of floors and therefore, the conduct of the Opposite Party is in pursuance of the said Agreement. This, to our understanding, is nothing but manifestation of the abusive conduct with which the Opposite Party justifies its unfair actions. When consumers/buyers invest in a particular project, they ought to know with some certainty, the final structure of the apartment. Moreover, at the time of booking when the application money was paid by the apartment buyer/allottee, there was no mention of such one-sided/oppressive Clauses and by the time the Applicants got the Buyer's Agreement, they had no option to withdraw. The observations made in this regard in the COMPAT's order are supportive of the Commission's stand on this issue. As stated therein, the Opposite cannot hide itself behind Clause No. 33 of the Buyer's Agreement, which itself is as vague as it could be. There is no surety on the strength of the building and how far the Opposite Party can go upto and whether it could add another five or ten floors at this stage. To quote COMPAT's order '[a] shocking surprise thus came to be slapped by the Appellant on the allottees by increasing ten floors, that too without finality, as it is still unknown as to whether the Appellant has let the allottees know about the total capacity of the building or its structural strength'.

6.35 The Commission has discussed this issue in detail while passing the final order in the *Belaire's* case also. When a person chooses a particular apartment, he/she considers factors such as FAR, availability of bigger common areas, common facilities etc. If the number of apartments in a project is substantially increased, as in this case, there is considerable reduction of consumer welfare. For example, if a hundred residents are supposed to share one/two/three lift (s), their satisfaction from that common lift (s) would be far less if suddenly the builder tells them they have to share the lift (s) with 200 residents. Though the Opposite Party has argued that the actual

number of flats was lesser than the initial contemplation, as stated earlier figure of 3140 apartments was a variable figure considering that the construction of all the towers was not yet complete. Even otherwise, with regard to common facilities which are specific to each and every tower, the shared benefit will be reduced for buyers who have been allotted apartments in the towers in which the number of floors have been increased indiscriminately by the Opposite Party.

6.36 It is, therefore, quite clear that the conduct of the Opposite Party in making additions to the number of floors beyond the number intimated to the apartment allottee amounts to abuse of dominant position.

Unfair Cancellation Policy and Forfeiture of Booking Amount

6.37 Further, the DG also found merit in the allegations posed against the Opposite Party regarding forfeiture of booking amount in case a buyer wishes to cancel the allotment in pursuance of Clause 3 and 4 of the Buyer's Agreement. Further, the DG found that as per Clause 9 and 10, no right had been provided to buyers to raise any objection towards alterations/modifications. This, as per the DG, was unfair and abusive.

6.38 The DG further found that when the apartment buyers raised issues with the Opposite Party regarding various misrepresentations, they were threatened that their allotments would be cancelled. Thereafter, the Opposite Party cancelled the allotment of certain buyers and forfeited their booking amount of about Rs. 7 lacs each. This act of cancellation on arbitrary terms also amounts to abuse.

Unfair Additional Demands on account of Increase in Super Area

6.39 Further, the DG also found that the act of the Opposite Party in increasing the super area arbitrarily amounted to abuse of dominant position. The apartment's initial super area was 2505 sq. ft. which was increased by 125 sq. ft. to make it to 2630 sq. ft. Thereafter, *vide* letter dated, 24th November, 2011, the Opposite Party in Case No. 55 of 2012 demanded additional payments on account of External Development Charges/Infrastructure Development Charges etc. on the increased super area of 2630 sq. ft. This as per the Commission amounts to abuse of dominant position as the buyers were taken by surprise and they had no option but to succumb to the pressures of the Opposite Party. The COMPAT's order also held such unilateral increase to be abusive as the only option left with the apartment buyers in such cases is to exit which is a costly option.

6.40 Throughout the proceedings, the Counsel of the Opposite Party urged that allegations of the Informants are misplaced as all the alterations in the residential projects were done in pursuance of the Buyers' Agreements' signed voluntarily by them. It was contended that the Buyers' Agreements clearly mentioned that Opposite Party has a right to increase the number of floors, demand additional payments for increase in the super area etc. and therefore, the said actions were in pursuance of the Clauses of the Buyers' Agreements. The Commission is not impressed by this argument of the Opposite Party. Rather, the COMPAT's order has found the said conduct of the Opposite Party of relying on such Clauses in the Buyers' Agreement to impose unfair demands or to increase the number of floors on the apartment allottee to be amounting to imposition of fresh conditions. A complete reading of the COMPAT's order makes it amply clear that it never suggested that DLF (i.e. the Opposite Party) can rely on vague Clauses and take the consumers by surprise. Such element of surprise and vagueness with which DLF treated its apartment buyers was held to be abusive. The following excerpts, which were laid down while dealing with the issue of abuse by DLF, from COMPAT's order are relevant here:

'What strikes us the most is the **mysterious silence on the part of the Appellant, to let the allottees know the number of additional floors**, which they planned to and would be constructing, which fact they knew at the very moment of starting of the construction. **Even if that date of the ABA is prior to the crucial date of 20th May, 2009, the fact of the matter remains that on the date when the ABAs were signed, probably even the required approvals were not applied for**. They were applied only after the ABAs were executed, but certainly before 20th May, 2009. However, the revised approvals in all the three residential housing buildings came certainly after 20th May, 2009. It is this element of surprise which is very striking. **The Appellant in this regard conveniently kept quiet. At least when the Act came into force, they were bound to inform the allottees about the proposed increase in the number of floors and could not have relied on Clause 9.1 of the ABA, which was as vague as could be, without any indication about the number of floors that could be added under the rules**.' (Para 101)

(emphasis supplied)

6.41 Therefore, in the Commission's view, the COMPAT's order is very clear that the Opposite Party cannot take protection of the vague Clauses (e.g. the right of DLF to increase the number of floors) to give effect to abusive acts and claim that its acts are immune from the jurisdiction of the Commission.

Unfair Financial Pressure on the Apartment Buyers

6.42 It was alleged that the Opposite Party burdened the apartment buyers with unfair financial pressure on account of additional EDC/IDC because of readjustment of the super area. The DG found the said charges to be amounting to imposition of unfair condition on the buyers and therefore, in contravention of Section 4(2)(a)(i) of the Act. The Commission agrees with the finding of the DG on this issue. The unilateral imposition of additional demands made by the Opposite Party which were not expected by the Informants amounts to imposition of unfair condition. Such impositions, which were levied on the Informants post 20th May, 2009, amounts to imposition of unfair conditions on the apartment buyers by the Opposite Party.

6.43 In view of the foregoing, the Commission is of the opinion that the conduct of Opposite Party in increasing the number of floors, in demanding additional payments pursuant to increase in the super area and arbitrary cancellation of allotment is unfair within the meaning of Section 4(2)(a)(i) of the Act.

Unfairness of the Buyers' Agreement

6.44 Apart from the specific conduct of the DLF, which took place post 20th May, 2009, the DG also examined the Buyers' Agreements entered into between the Informants and the Opposite Party and found various terms and conditions to be unfair and hence, abusive.

6.45 It will be useful here to reiterate the findings of the Commission in the *Belaire's* case with respect to the one-sided terms and conditions in the Buyers' Agreements (referred to as the ABA in the *Belaire's* case). Condemning the Clauses to be draconian and one-sided, the Commission held the same to be abusive under Section 4(2)(a)(i) of the Act. The Commission categorically stated that the Clauses give sole discretion to the Opposite Party in respect of change of zoning plans, usage patterns, carpet area, alteration of structure etc. In case of change in location of the apartment, PLC is determined at the discretion of the Opposite Party and if a refund is due, no interest is paid. No rights have been given to the buyers for raising any objections. It was further noted that despite knowing that necessary approvals were pending at

the time of accepting booking amounts, the Opposite Party inserted Clauses that made exit next to impossible for the buyers. Similarly, in event of delay in delivering possession to the buyers, the Opposite Party was not liable to pay any substantial compensation. The Commission then held that such Clauses depict how heavily the buyers' agreement was loaded in favour of the Opposite Party and against the buyer. The Commission observed that the impunity with which these Clauses have been imposed, the brutal disregard to buyers' right that has been displayed in its action of cancelling allotments and forfeiting deposits and the deliberate strategy of obfuscating the terms and keeping buyers in the dark about the eventual shape, size, location etc. of the apartment cannot be termed as fair. Based on these observations, the Commission held that the Clauses and conduct of the Opposite Party as recorded in the order passed under *Belaire's* case were blatantly unfair and exploitative.

6.46 The Commission is of the view that the findings of the Commission in the *Belaire's* case squarely apply to the facts of the present cases, the Buyers' Agreement being substantially similar to the ABAs considered in that case. The same are not reproduced for the sake of brevity. The way the Opposite Party has conducted itself and the course the progress of the project has taken indicates that the Opposite Party deceived the innocent buyers through false solicitations and promises.

6.47 The Commission, therefore, accepts the findings of the DG and holds that the terms and conditions imposed through the Buyer's Agreement were abusive being unfair within the meaning of Section 4(2)(a)(i) of the Act.

ORDER

7. In view of the above, and in exercise of powers under Section 27(a) of the Act, the Commission directs the Opposite Party and its group companies operating in the relevant market 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 in the preceding paras of the order.

8. With regard to penalty, the Commission is of the view that since a penalty of Rs. 630 Crores has already been imposed on the Opposite Party in the *Belaire's* Case for the same time period to which contravention in 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 Opposite Party in these cases.

9. The Secretary is directed to inform the parties accordingly.