



COMPETITION COMMISSION OF INDIA

(Combination Registration No. C-2014/03/162)

27.05.2014

Order u/s 43A of the Competition Act, 2002 in the notice given u/s 6(2) by Tesco Overseas Investments Limited.

1. On 31st March 2014, the Competition Commission of India (hereinafter referred to as the “**Commission**”) received a notice relating to the proposed acquisition of fifty percent of the issued and paid-up equity share capital of Trent Hypermarket Limited (hereinafter referred to as “**THL**”) by Tesco Overseas Investments Limited (hereinafter after referred to as “**TOIL**” or “**Acquirer**”). The notice was given by TOIL, pursuant to the execution of Joint Venture Agreement and Share Purchase Agreement between TOIL, THL and Trent Limited (hereinafter referred to as “**Trent**”), on 21st March 2014.
2. As per the information provided in the notice, the Acquirer vide its application dated 17th December 2013 (hereinafter after referred to as “**Application**”) had sought the approval of the Department of Industrial Policy and Promotion, Ministry of Commerce & Industry (“**DIPP**”) and Foreign Investment and Promotion Board, Ministry of Finance (“**FIPB**”) for the acquisition of fifty percent of the issued and paid-up equity share capital of THL.
3. In terms of sub-section (2) of Section 6 of the Act, any person or enterprise, who or which proposes to enter into a combination, shall give notice to the Commission, disclosing the details of the proposed combination, *within thirty days of execution of any agreement or other document for acquisition* referred to in clause (a) of Section 5 or acquiring of control referred to in clause (b) of that section. The sub-regulation (8) of Regulation 5 of the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (hereinafter referred to as the “**Combination Regulations**”) explains the nature of documents that would qualify as other document. The text of sub-regulation (8) of Regulation 5 of the Combination Regulation is reproduced below:



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“ The reference to the ‘other document’ in clause (b) of sub-section (2) of section 6 of the Act shall mean any binding document, by whatever name called, conveying an agreement or decision to acquire control, shares, voting rights or assets:

Provided that if the acquisition is without the consent of the enterprise being acquired, any document executed by the acquiring enterprise, by whatever name called, conveying a decision to acquire control, shares or voting rights shall be the ‘other document’:

Provided further that where such a document has not been executed but the intention to acquire is communicated to the Central Government or State Government or a Statutory Authority, the date of such communication shall be deemed to be the date of execution of the other document for acquisition.”

4. Thus, in terms of above provisions, the Acquirer was required to give notice to the Commission within thirty days of its application to the DIPP and the FIPB i.e., by 16th January 2014. However, the notice was given by the Acquirer on 31st March 2014, with a delay of around 73 days.
5. In terms of Regulation 14 of the Combinations Regulations, vide letter dated 4th April 2014, the Acquirer was therefore, required to clarify as to why the notice was not filed within the time prescribed under sub-section (2) of Section 6 of the Act. The Acquirer filed its response on 9th April 2014.
6. The Commission, in its meeting held on 17th April 2014, considered the response filed by the Acquirer as above and inter-alia decided to admit the belated notice in terms of Regulation 7 of the Combination Regulations, without prejudice to the penal action that may be initiated separately under Section 43A of the Act. In the said meeting, the Commission also decided to initiate separate proceedings under Regulation 48 of the Competition Commission of India (General) Regulations, 2009 (hereinafter referred to as the “**General Regulations**”), regarding imposition of penalty under Section 43A of the Act, as the abovesaid notice was not given within the time prescribed under sub-section (2) of Section 6 of the Act.



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7. Accordingly, in terms of Regulation 48 of the General Regulations read with Section 43A of the Act, a show cause notice dated 22nd April 2014 was sent to the Acquirer to show cause, in writing, within 15 days of the receipt of notice as to why penalty, in terms of Section 43A of the Act should not be imposed on it for not having filed the notice within the time prescribed under sub-section (2) of Section 6 of the Act. The Acquirer filed its response to the show cause notice, in the form of written submissions, on 6th May 2014. In the said response, the authorised representative of the Acquirer has, inter-alia, raised the following points:
- (a) It was the bona fide assessment of the parties that the requirement for notification had not been triggered under the Act at the time of submitting the proposal to the DIPP and the FIPB, as TOIL had not communicated its intention to acquire shares of THL under the proposal. The Acquirer further stated that, "...the requirement for a notice of an acquisition could be triggered pursuant to the second proviso of regulation 5(8), only if communication to the Central Government, State Government or a Statutory Authority, conveys an intention or decision to acquire control, shares, voting rights or assets. In the present case, no intention or decision to acquire was formed by TOIL at the time of making the Application to the DIPP and the Application could not be considered as communication of TOIL's intention or decision to acquire shares of THL. The respective boards of the parties had only provided their in-principle approval to the proposal and authorised filing of the Application. The board of directors of Trent and THL authorised the execution of the definitive agreements on 21st March 2014."
- (b) Had the Acquirer applied to the Commission for its approval within 30 days of the Application, at such a preliminary stage, full details of the proposed combination would not have been available and the notice would have been incomplete and without relevant and detailed information, necessary for a review by the Commission.
- (c) The Acquirer has referred to the Commission's order in combination case no. C-2012/07/69, wherein, it was held by the Commission that the notification was premature as the combination proposal was yet to be accepted by the board of directors of the parties to the combination and the discussions with respect to



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terms of the combination were still underway being subject to definitive agreements. Hence, the preliminary document executed by the parties was an interim arrangement and had not triggered the requirement to file notice under sub-section (2) of section 6 of the Act. Therefore, the notice given by the parties was held not to be a valid notice in terms of regulation 14 read with regulation 5 of the Combination Regulations. The Acquirer has further submitted that in the instant case, the intent to enter into the combination was only given by TOIL's board on 17th March 2014 and the definitive agreements were not agreed by the parties until 21st March 2014. Therefore, based on the Commission's decision in the combination case no. C-2012/07/69, the arrangement between the parties to submit a proposal to the FIPB and DIPP was only an interim arrangement and a step towards negotiation, and therefore, any notification prior to the foregoing dates would have been premature. Further, referring to the combination case no. C-2013/01/108, the Acquirer has stated that in the said notice regarding the proposed combination was given to the Commission within 30 days of their application to the relevant statutory body, i.e., Insurance Regulatory and Development Authority ("IRDA"), as in the said case, the parties had finalised the terms of definitive agreements, drafts of which had been initialled and submitted to the Commission along with the notification. The Acquirer claims that the facts and circumstances of the instant case are different from the abovesaid case, as the commercial details of the proposed transaction were finalised only after the receipt of approval from the DIPP.

- (d) The Acquirer has not intentionally failed to notify the Commission and on the contrary, has voluntarily submitted the notice shortly after the definitive documents were executed.
8. On the request of the Acquirer, the Commission also heard the authorised representatives of the Acquirer in its meeting held on 27th May 2014.
9. The submissions of the Acquirer, both written and oral, were duly considered by the Commission and it was held as under:
- (a) As regards the contention of the Acquirer that its Application to the DIPP and FIPB did not communicate the intention to acquire shares of THL, it is observed



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that in its application, the Acquirer had sought the approval of the DIPP and FIPB for the proposal to acquire fifty percent of the issued and paid up equity share capital of THL and that the said application inter-alia mentioned that the proposed investment by the TOIL will include subscription of equity shares of THL and acquisition of existing equity shares of THL from Trent. The resolution dated 3rd December 2013, passed by the board of directors of TOIL, states that TOIL was in discussion to subscribe and acquire equity shares from Trent, to the extent of fifty per cent of the share capital of THL for the purpose of undertaking multi-brand retail trading business in India through THL. The board of directors of THL, in its meeting held on 17th December 2013, resolved that, *“subject to the approval of the Foreign Investment Promotion Board (“FIPB”) and the Department of Industrial Policy and Promotion (“DIPP”) and in accordance with the provisions of the Companies Act, 1956 and/or the Companies Act, 2013, the Foreign Exchange Management Act, 1999, the Foreign Exchange Management (Transfer or issue of Securities by a Person Resident Outside India) Regulations, 2000, including any amendment, modification, variation or re-enactment thereof, and the provisions of any rules/regulations/guidelines issued/framed by the Central Government, Reserve Bank of India, and any other appropriate authorities (hereinafter referred to as “the Appropriate Authorities”), enabling provisions of the Memorandum and Articles of Association of the Company and execution of the definitive agreements, the consent, authority and approval of the Board of Directors be and is hereby accorded to the proposal of Tesco Overseas Investments Limited (“TOIL”) to acquire 50 per cent of the issued and paid up equity share capital of the Company (currently a wholly owned subsidiary of the Trent Limited) through purchase/subscription for the purpose of undertaking multi-brand retail trading business in India through the Company (“Proposal”).”*

In view of the foregoing, the claim of the Acquirer that no intention or decision to acquire was formed by TOIL at the time of making the application to the DIPP and FIPB is not correct.

- (b) The Acquirer’s claim that had the notice been filed with the Commission without executing the definitive agreement (s), it would have been incomplete as being without the relevant documents/details, is also misconceived as the Acquirer in



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its application to the DIPP/FIPB on 17th December 2013 had provided enough details of the proposed combination which demonstrate that the parties were aware about the type, nature and purpose of the proposed combination at the time of making the said application.

- (c) As regards the two combination cases referred to by the Acquirer in its response, it is observed that the decision of the Commission in the combination case no. C-2012/07/69 involved a scheme of merger/demerger and did not involve approval of the Central Government or State Government or any Statutory Authority. The parties in that case were required to give notice to the Commission within thirty days of approval of the proposal relating to merger or amalgamation by their board of directors. Citing reference to the Commission's decision in the combination case no. C-2013/01/108, the Acquirer has stated that the notice in the said case was given to the Commission within 30 days of the application to the IRDA, as the parties had finalised the terms of the definitive agreements. However, in the instant case, the commercial details of the proposed transaction were finalised only after the receipt of approval from the DIPP. In this regard, it is observed that, in case no. C-2013/01/108, the Commission clearly held that in terms of sub-regulation (8) of Regulation 5 of the Combination Regulations, the date of filing of application with the IRDA for approval of the combination would be the triggering date for giving notice under sub-section (2) of Section 6 of the Act. Therefore, the contention of the Acquirer that it has rightfully filed the notice within 30 days of entering into the definitive agreement(s) on 21st March 2014 is misconceived and cannot be accepted.

10. Thus, in terms of sub-section (2) of Section 6 of the Act and sub-regulation (8) of Regulation 5 of the Combination Regulations, the Acquirer ought to have filed notice with the Commission within thirty days of its application to the DIPP and the FIPB. However, the notice was given by the Acquirer on 31st March 2014, with a delay of around 73 days.
11. In terms of Section 43A of the Act, if any person or enterprise fails to give notice under sub-section (2) of Section 6 of the Act, the Commission shall impose on such person or enterprise a penalty which may extend to one per cent of the total turnover or the assets, whichever is higher, of such a combination. Therefore, under the provisions



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of the Act, the maximum penalty that may be imposed could be one percent of the total turnover or the assets, whichever is higher, of such a combination, which in the instant case is more than INR 600 crores. However, considering the fact that the Acquirer, notwithstanding the delay of around 73 days in giving notice, had voluntarily filed the notice within 30 days of executing the Joint Venture Agreement and Share Purchase Agreement, the Commission considered it appropriate to impose a nominal penalty of INR 3,00,00,000/- (INR Three Crores only) on the Acquirer. The Acquirer shall pay the penalty within sixty (60) days from the date of receipt of this order.

12. The Secretary is directed to communicate to the Acquirer accordingly.

(Ashok Chawla)
Chairperson

(Anurag Goel)
Member

(S.L. Bunker)
Member

(Sudhir Mital)
Member

(Augustine Peter)
Member