



Fair Competition
For Greater Good

COMPETITION COMMISSION OF INDIA

(Combination Registration No. C-2014/06/181)

10.02.2015

Order u/s 43A of the Competition Act, 2002 (“Act”) in the notice given u/s 6 (2) of the Act given by:

- (a) Zuari Fertilisers and Chemicals Limited (“ZFCL”); and
 - (b) Zuari Agro Chemicals Limited (“ZACL”).
1. On 11th June 2014, the Competition Commission of India (“Commission”) received a notice under sub-section (2) of Section 6 of the Act, given by ZFCL and ZACL (hereinafter ZFCL and ZACL collectively referred to as the “Acquirers”) pursuant to a shareholders agreement dated 12th May 2014, entered into between the Acquirers, and the UB group comprising United Breweries (Holdings) Limited, Kingfisher Finvest India Limited and McDowell Holdings Limited (“Shareholders Agreement”).
 2. As per the information provided in the notice, the proposed combination related to acquisition of upto 3,08,13,939 equity shares of Mangalore Chemicals and Fertilizers Limited (“MCFL”) (representing additional 26 per cent stake in MCFL) by the Acquirers through a competing open offer, as per the relevant provisions of Securities and Exchange Board of India (Substantial Acquisition of Shares & Takeovers) Regulations, 2011 (“Takeover Regulations”) (“Open Offer”). The public announcement (“PA”) for the Open Offer was issued, *inter alios*, by the Acquirers on 12th May 2014. Hereinafter, the Acquirers and MCFL are collectively referred to as the “Parties”.
 3. In this regard, the Commission observed that the Acquirers held approx. 16.43 per cent in the equity share capital of MCFL prior to giving the abovesaid notice under sub-section (2) of Section 6 of the Act. It was found that the Acquirers had acquired the aforesaid 16.43 per cent (approx.) in the equity share capital of MCFL during the period from April 2013 to July 2013 in four tranches acquired on 2nd April 2013 (“Tranche 1”), 10th July 2013 (“Tranche 2”), 11th July 2013 (“Tranche 3”) and 12th July 2013 (“Tranche 4”) respectively (“Acquisition”). The Commission also observed



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from publicly available material that the Acquirers were competing with Deepak Fertilizers and Petrochemicals Corporation Limited (“**Deepak**”) through its wholly owned subsidiary SCM Soilfert Limited (“**SCM**”) for control over MCFL and that the acquisition bid of Deepak and Zuari group for control in MCFL started in April 2013 with Zuari’s acquisition of 9.72 per cent stake in MCFL. It was observed, *inter alia*, that the price per share paid for Tranche 2, Tranche 3 and Tranche 4 were significantly higher than that paid for shares acquired in Tranche 1. A number of media reports suggested that there was an understanding between the Parties on this matter. The foregoing suggested that the Acquisition did not fall in the category of acquisitions which normally need not be filed in terms of Regulation 4 of the the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (“**Combination Regulations**”) read with Item 1 of Schedule I to the Combination Regulations. However, the Acquirers did not file a notice in terms of sub-section (2) of Section 6 of the Act for the Acquisition. As per section 43A of the Act, failure to file notice in terms of the provisions of sub-section (2) of Section 6 of the Act is liable for penalty. Therefore, the Commission in its meeting held on 4th September 2014, decided to initiate penalty proceedings under Section 43A of the Act against the Acquirers. Accordingly, vide show cause notice dated 15th September 2014, issued under Regulation 48 the Competition Commission of India (General) Regulations, 2009 (“**General Regulations**”) read with Section 43A of the Act (“**Notice**”), the Acquirers were required to show cause, in writing, within 15 days of the receipt of the Notice, as to why penalty in terms of Section 43A of the Act should not be imposed on them, for failure to file notice in terms of Section 6(2) of the Act with respect to the Acquisition.

4. In response to the Notice, the Acquirers filed their reply on 8th October 2014 after seeking extension of time (“**Reply**”). In the Reply, the Acquirers contended the following:
 - (i) The Acquisition (aggregating to 16.43 per cent equity shares of MCFL) by ZFCL was made without any arrangement with either MCFL or any other entity and was in the nature of opportunistic open market purchases made on the stock exchange. An agreement was concluded between the Acquires and the UB Group in relation to MCFL to act as persons acting in concert and to make an open offer for shares of MCFL only in May 2014 which was approved by ZFCL’s board of directors on



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12th May 2014 nearly one year after ZFCL's initial acquisition. This was notified to the Commission on 11th June 2014 in compliance with the provisions of the Act. There was no agreement between Adventz Group/Mr. Saroj Poddar¹ and UB Group pertaining to right of first refusal ("RoFR") over the shares owned by UB Group in MCFL, prior to the Shareholders Agreement between the Acquires and the UB Group. Further, the entire understanding and agreement between the Acquirers and the UB group was captured in the Shareholders Agreement which was duly notified to the Commission.

- (ii) The board of ZFCL, vide resolution dated 25th March 2013, had authorized ZFCL to invest upto INR 100 crores in a fertilizer company without specifying any percentage stake to be acquired. Thus, the intention of ZFCL's board at the time of such acquisition(s) was only to invest in a fertilizer company and there was no authorization to acquire any form of control or voting arrangement in such a company, or become involved in running or managing of any such company. The board resolution dated 25th March, 2013 can be distinguished from the board resolution dated 12th May, 2014 as vide the latter, ZFCL was specifically authorized to enter into the Shareholders Agreement and make an open offer under the Takeover Regulations to acquire shares of MCFL.
- (iii) With regard to the media reports and publicly available material, the Acquirers contended that there were various statements that had been attributed to Mr. Saroj Poddar in the said press releases. However, at the time of acquisition of the shares in the four tranches, there was no arrangement of any kind with Mr. Mallya or the UB group for acquisition of control in MCFL, nor was there any intention of acquiring control over MCFL. Significantly, ZFCL had acquired only 16.43 per cent shares of MCFL with no rights of any kind attached to it. And that ZFCL had no intention to acquire additional shares as in any case, ZFCL had exhausted the authorized limit of INR 100 crores which the board of ZFCL had authorised to it vide resolution dated 25th March 2013.
- (iv) The Acquirers wanted to invest in MCFL shares at the right opportunity depending upon the share price movement and not in one go. After ZFCL's

¹ Mr. Saroj Poddar, heads the Adventz group which has interests in fertilizer sector through its various group companies including Paradeep Phosphates Ltd., Zuari Agro Chemicals Limited and ZFCL.



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investment in Tranche 1, Deepak bought 24.46 per cent equity shares of MCFL on 3rd July 2013. With Deepak's acquisition of a 24.46 per cent stake in MCFL, it appeared that Deepak would make an open offer to the shareholders of MCFL. Consequently, the price of MCFL's shares started rising and the Acquirers invested the balance of the amount as authorised by its board, by acquiring 6.71 per cent in MCFL with a view to benefit from a further rise in the share prices of MCFL. At this stage also, the Acquirers did not have any arrangement with anyone in relation to the acquisition of additional shares of MCFL nor did they acquire any special rights as a result of the acquisition and these shares were bought by the Acquirers at the prevailing market price only.

- (v) The Acquirers had opportunity to acquire shares of MCFL in July 2013 as well as in August 2013 when the prices of MCFL's shares had come down considerably. However, as the Acquirers had board approval for investment upto INR 100 crores only in the shares of MCFL, the Acquirers did not make additional investment in MCFL as ZFCL had exhausted the limit.
 - (vi) The Acquisition was solely for investment purposes, without any intention or agreement to acquire any form of control or other participative interest in MCFL. Since the investment made in MCFL was under 25 per cent of the equity share capital and without any agreement or intention to acquire control and for investment purpose only, the Acquires believed that the transaction was covered under Item 1 of Schedule I to the Combination Regulations and accordingly did not notify the Acquisition to the Commission as per the provisions of Regulation 4 of the Combination Regulations.
5. In the Reply, as the Acquirers had requested for an oral hearing, the Commission heard the Acquirers in its meeting held on 22nd December 2014. The Commission again considered the matter in its meeting held on 10th February, 2015.
6. The Acquirers have submitted that the Acquisition was not notifiable as it 'was [made] solely as an investment' and was, therefore, exempted from notification under Item 1 of Schedule I read with Regulation 4 of the Combination Regulations. From a perusal of Item 1 of Schedule I to the Combination Regulations, it is amply clear that Item 1 read with Regulation 4 of the Combination Regulations deems acquisitions as normally



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- not notifiable provided that the proposed acquisition of shares or voting rights does not entitle the acquirer to hold 25 per cent or more of the total shares or voting rights, directly or indirectly, in the target enterprise and does not lead to a change of control and is made (i) solely as an investment, or (ii) is in the ordinary course of business.
7. It is observed that the categories of combinations listed in Schedule I to the Combination Regulations must be interpreted in light of the Commission's objectives (listed in Section 18 of the Act) and the intent of Schedule I (expressed in Regulation 4 of the Combination Regulations). This means that the categories of combinations listed in Schedule I as normally not notifiable ought not to include combinations which envisage or are likely to cause a change in control or are of the nature of strategic combinations including those between competing enterprises or enterprises active in vertical markets.
 8. In the instant case, the Acquirers have claimed that the Acquisition was '*solely as an investment*'. In this regard, it is observed that the phrase '*solely as an investment*' indicates '*passive investment*' and any investment in a target enterprise which is done with a strategic intent cannot be treated as '*solely as an investment*'. Therefore, to qualify for '*exemption*' under Item 1 of Schedule I to the Combination Regulations, an acquisition must not have been made with an intention of participating in the formulation, determination or direction of the basic business decisions of the target. Further, it is observed that while such participation may be through various means including voting rights, agreements, representation on the boards of the target enterprise or its affiliate companies, any of the affirmative or veto rights in the target enterprise or its affiliate companies, however in this regard, it is also noted that the absence of evidence of written and binding documents between parties does not necessarily preclude the existence of strategic intent behind an acquisition which is a combination under the provisions of Section 5 of the Act. Therefore, other factors including surrounding circumstances must also be taken into consideration to determine whether the proposed acquisition falls under Item 1 of Schedule I to the Combination Regulations.
 9. In the instant case, the Acquirers have stated that the Acquisition was solely as an investment. However, it is observed that the Acquirers have not been able to present



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any conclusive evidence in this regard. Further, the Commission noted that in an interview to a news channel, Mr. Saroj Poddar had *inter alia*, stated that the Acquisition was made “*after consulting Vijay Mallya and after an agreement with him that he will not divest them [shares] but enter into a joint venture with Zuari and that was the motive behind our [i.e. Acquirers’] acquisition of shares*”.² Mr. Poddar had further stated in the aforesaid interview that the Acquirers and the then-Chairman of MCFL and promoter of UB group, i.e. Mr. Mallya wanted to operate MCFL as joint venture between Zuari and UB group. The transcript and web address of the aforesaid interview was shared with the Acquirers with a direction dated 8th December 2014 to submit their response (if any) in writing by 15th December 2014. However, the Acquirers did not file their response.

10. With regard to admissibility of television interview as evidence, it is noted that televised interview must be differentiated from a news article wherein the author using unnamed sources writes a report. A televised interview wherein the Chairman of an enterprise provides information pertaining to the enterprise cannot be treated as mere hearsay. Further, it is observed from the existing jurisprudence on admissibility of television interview as evidence, that television interview is admissible as evidence provided the parties are afforded an opportunity for a hearing, which in the instant case was given.
11. From the foregoing, it is evident that the Acquirers consummated the Acquisition without giving notice in terms of sub-section (2) of Section 6 of the Act, thereby contravening the provisions of Section 6(2) of the Act. Thus, the Acquirers are liable for penalty under Section 43A of the Act.
12. 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. However, considering the fact that the Acquirers disclosed the information regarding mode and timeline of the Acquisition, and given the quantum of the turnover of the combination, the

²Mr. Saroj Poddar’s televised interview and transcript is available at http://www.moneycontrol.com/news/business/will-sell-mcf-stake-if-mallya-keeps-mumjv-plan-zuari_954916.html; last accessed on 22nd December 2014



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Commission considered it appropriate to impose a nominal penalty of INR 3,00,00,000 (INR Three Crores only) on the Acquirers. The Acquirers shall pay the penalty within sixty (60) days from the date of receipt of this order.

13. The Secretary is directed to communicate to the Acquirers accordingly.