



COMPETITION COMMISSION OF INDIA
Combination Registration No. C-2019/11/703

04.01.2021

Notice filed under Section 6(2) of the Act by ZF Friedrichshafen AG

CORAM

Mr. Ashok Kumar Gupta
Chairperson

Ms. Sangeeta Verma
Member

Mr. Bhagwant Singh Bishnoi
Member

Order

Background

1. On 7th November 2019, the Competition Commission of India received a Notice under Section 6(2) of the Competition Act, 2002 (**Act**) from ZF Friedrichshafen AG (**ZF/ Acquirer**) regarding its proposed acquisition of WABCO Holdings Inc. (**WABCO**) (hereinafter, ZF and WABCO are collectively referred to as "**Parties**"). The Parties entered into a Business Transfer Agreement (BTA) dated 28.03.2019, pursuant to which ZF will acquire 100% shares in WABCO, via its indirect wholly owned subsidiary Verona Merger Sub Corp (**Proposed Combination**).
2. The Commission, in its meeting held on 14th February 2020, approved the said Proposed Combination under Section 31 of the Act subject to certain commitments. In this regard, the detailed Order dated 14.02.2020 (**Order**) was received by the Acquirer on 29th April 2020 and accordingly, the Effective Date for compliance as per the terms of the Order is 29.04.2020 (**Effective Date**).
3. The Order *inter alia*, requires ZF to divest its 49% indirect shareholding in Brakes India Private Limited (**Brakes India**) (hereinafter, referred to as "**Brakes India Divestment**"), within a period of [REDACTED] from the "Effective Date", i.e. [REDACTED] or such extended period as may be agreed by the Commission (**First Divestiture Period**). Further, the Order requires ZF to submit a fully documented and reasoned



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proposal for the divestment, including (i) a copy of the final agreement(s) and (ii) the proposed purchaser to be approved, within a period of [REDACTED] from the Effective Date, i.e. by [REDACTED] (**Reasoned Proposal**).

4. In case Brakes India Divestment is unable to close within the First Divestiture Period then the Second Divestiture Period shall commence and will last for a period of up to [REDACTED] (or such extended period as may be agreed by the Commission and the Divestiture Agency) for carrying out the proposed divestment through the Divestiture Agency to be appointed by the Commission (**Second Divestiture Period**).

ZF's request for extension of time period to submit (i) transaction documents and (ii) purchaser details for the Brakes India Divestment and decision of the Commission

5. ZF vide its application dated 03.11.2020, *inter alia*, requested the Commission to grant ZF an extension of a period of [REDACTED] to submit the Reasoned Proposal, therefore, also extending the overall First Divestment Period [REDACTED].
6. The Commission considered the request for extension of First Divestment Period received from ZF and decided not to extend the First Divestment Period, however, granted extension of time for submission of transaction documents by [REDACTED] and complete the divestment by [REDACTED]. The decision of the Commission was communicated to ZF vide Commission's letter dated 02.12.2020.
7. Subsequently, the Commission in its meeting held on 17.12.2020, considered ZF's letters dated 03.12.2020, 08.12.2020 and 15.12.2020 to reconsider their request for extension of First Divestiture Period. Upon considering the above request(s), the Commission directed ZF to submit all details, including the chronology of events, action plan, if any, devised to complete the Brakes India Divestment within the First Divestment Period. Further, ZF was directed to furnish all steps and measures taken by it to complete Brakes India Divestment since the approval of the combination and communication of the same was made on 14.02.2020.
8. Additionally, ZF was also directed to inform the date on which the combination was consummated. Further, ZF was directed to furnish the above details latest by 21.12.2020. The directions of the Commission were communicated to ZF vide letter dated 18.12.2020.

Writ Petition [W.P. (C) 10755/2020] before the Hon'ble High Court of Delhi at New Delhi



9. A Writ Petition (WP) has been filed before the Hon'ble High Court of Delhi in the said matter. The matter was heard by the Hon'ble High Court of Delhi on 21.12.2020. The Hon'ble High Court directed "*...that on the petitioners submitting the documents as required by the respondent in its letter dated 18.12.2020, the respondent shall, without prejudice to the Impugned Order, consider the same in accordance with law. In the meantime, no coercive action shall be taken against the petitioners for non-submission of the transaction documents as required in the order impugned in this petition.*"
10. Pursuant to the directions of the Hon'ble High Court of Delhi, ZF provided the response to Commission's letter dated 18.12.2020, vide its submission dated 23.12.2020. The same was considered by the Commission in its meeting held on 28.12.2020. Upon considering the submission(s) of ZF, the Commission decided to grant opportunity of oral hearing to ZF to present its case before the Commission on 30.12.2020.

Oral Hearing on 30th December 2020

11. In the oral hearing held on 30th December 2020, the learned counsel for ZF, Advocate Shri Rajshekhar Rao argued the matter at length and completed the oral submissions. ZF further undertook to file their written submission including affidavit, in relation to the reasons for delay in divestiture process, by 01.01.2021. ZF in its submissions dated 01.01.2021 *inter alia* reiterated that the delay in the process of divestment of its shares in Brakes India is owing to (i) the COVID-19 global pandemic and (ii) delays caused by third party actions, which are beyond ZF's control. ZF also referred to its earlier submissions in relation to the delays caused on account of the global pandemic: (a) 5th August 2020; (b) 13th October 2020; (c) 3rd November 2020; (d) 8th December 2020; and (e) 23rd December 2020.
12. ZF submitted that COVID-19 global pandemic is an unprecedented situation, causing unavoidable delays in business and deal making. Physical meetings could not take place, and there were hurdles in arriving at an appropriate valuation in a COVID-19 business environment, etc. Globally and in India, the business functioning of most offices has been hampered. The pandemic has significantly increased the timelines for most tasks involved in the divestment process. Various global competition authorities have extended divestment periods/ timelines.
13. Further, it was submitted by ZF that delays were caused by third party actions, which are beyond ZF's control. There was considerable delay in receipt of business plan from TVS / Brakes India. ZF has been requesting TVS/ Brakes India to provide it with an updated business plan since mid-June 2020. ZF has finally received the updated consolidated business plan from Brakes India only on 11th October 2020.



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14. ZF made the following additional submissions along with Affidavit about delays caused by third party actions vide email dated 01st January 2021.

“a. The Hon’ble Commission’s letter dated 2 December 2020 had summarily rejected ZF’s Request for Extension of the First Divestment Period solely on the ground that “undue extension of the transitory arrangements may impact the competitive behavior of Brakes India”. As detailed previously, this finding of the Hon’ble Commission is in contrast to the fact that the ‘ring-fencing’ and ‘hold-separate’ obligation imposed by the Hon’ble Commission have already been implemented, and the Hon’ble Commission itself has recognised that completion of such steps will: (a) ensure the independence of Brakes India, and (b) prevent harm to competition in the market (see the Approval Order at paragraph 12 of Annexure A). Therefore, it is humbly submitted that the conditions imposed by the Hon’ble Commission already address the concerns raised in the letter dated 2 December 2020 and no prejudice would be caused by grant of an extension as prayed for, particularly in view of the circumstances set out in the previous submissions and also during the hearing on 30 December 2020 and in the accompanying affidavit.

b. On 28 December 2020, [REDACTED] there is a clear road-map to implement the Brakes India Divestment as soon as possible. ZF reiterates that this is the most efficient means to achieve the Brakes India Divestment. An anticipated timeline for completion of the Brakes India Divestment [REDACTED] already been provided to the Hon’ble Commission at Annexure 4 in the response dated 23 December 2020.

c. Lastly, as submitted previously, ZF’s request for a [REDACTED] of time to implement the Brakes India Divestment is reasonable (based on the multiple reasons highlighted previously) and ought not to be viewed as an attempt to circumvent the Brakes India Divestment or the Hon’ble Commission’s Order. ZF is not seeking for and has never sought a waiver of the Brakes India Divestment or any of the other conditions set out in the Hon’ble Commission’s Order, and the extension is solely aimed at implementing the Brakes India Divestment in a fair and efficient manner. In a situation wherein ZF is unable to receive an extension from the Hon’ble Commission, ZF will suffer significant commercial losses and will be forced to pursue other remedies which may delay the entire process of the Brakes India Divestment and which is inconsistent with the economic rationale underlying the divestment process. Therefore, it is humbly submitted that the Hon’ble Commission should assess whether the benefits of granting an extension to ZF at this stage outweighs the harm that will be caused in case no extension is granted to ZF.”



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Observations of the Commission and decision

15. Upon considering the above submission(s) in relation to request(s) for extension of First Divestiture Period, and upon hearing the counsel for ZF, the Commission observes as mentioned in the subsequent paragraphs.
16. At the outset, the request for extension of time for First Divestment Period (FDP) was not summarily rejected, as portrayed by ZF. In November 2020, there was no visibility on the end of the divestment process in order to grant a long extension of 6 months as requested by ZF. There was still time for end of First Divestiture Period while the date for submission of draft transaction documents was extended by one month from [REDACTED] to [REDACTED]. Meanwhile, information/ document(s) were sought from ZF *vide* letter dated 18th December 2020 to substantiate or provide additional material to support its claim for extension of First Divestiture Period.
17. The Commission further notes that it was reasonable not to have insisted on upfront Brakes India Divestment (i.e. before the consummation of the acquisition of WABCO by ZF). The Commission agreed to [REDACTED] time for divestment, as proposed by ZF, and ZF had additional [REDACTED] as a result of the order of the Commission being served only on 29th April, 2020 (the Effective date for compliance of the order) while the approval subject to voluntary modifications submitted by ZF was granted on 14th February, 2020. It is to be noted that ZF was fully aware/conscious of its obligations from the date of the Order i.e. 14th February 2020. ZF has implemented the acquisition of WABCO on 29th May, 2020, and therefore its inability to divest its shares in Brakes India within the [REDACTED] additional period of [REDACTED] is inexplicable.
18. It is observed that ZF, in its oral hearing submitted that *“the Commission’s finding that “undue extension of the transitory arrangements may impact the competitive behavior of Brakes India”, is in contrast to the fact that the ‘ring-fencing’ and ‘hold-separate’ obligation imposed by the Hon’ble Commission have already been implemented, and the Hon’ble Commission itself has recognised that completion of such steps will: (a) ensure the independence of Brakes India, and (b) prevent harm to competition in the market.”* The Commission reiterates that the hold-separate arrangement is only a necessary requirement for preservation of competition in the market for facilitating the simultaneous process of consummation of the combination and the divestment of Brake India but not a sufficient one to restore the competitive landscape in the market.
19. Further, it is to be noted that the Brakes India divestment was voluntarily undertaken by ZF and ordered by the Commission to address the likely anti-competitive harms resulting from the combination. Thus, it is appropriate to ensure that the implementation of the remedy is done at the earliest upon the consummation of the combination. ZF is well aware that as per the Order it cannot, acquire WABCO and at



the same time continue to hold its shares in Brakes India unconditionally. Therefore, hold-separate obligations are only a transitory arrangement. After acquisition of WABCO in May 2020, ZF should have shown the same alacrity in completing the divestment of shares rather than continuing with the hold-separate arrangement. Although hold-separate obligation is in place it cannot be equated to the abilities of a JV partner who can steer competitive business decisions. In simple terms, more the delay, higher the risk of reducing the competitiveness and economic viability of Brakes India, which are the basic objectives of ordering the remedies. This is more so in a highly concentrated market structure where ZF and WABCO are competitors of Brakes India.

20. Regarding submissions about delay caused by COVID-19, the Commission notes that the Parties have consummated the merger during peak of COVID-19 period in May 2020. Therefore, there is no explanation forthcoming in their submissions for not having negotiations with Joint Venture partner of Brakes India during the same period as per the agreement between them.

21. ZF further, submitted that the delays are caused due to third party actions beyond its control. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



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[REDACTED]

22. It can be observed that the above clauses [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
Further, ZF is also aware of the timelines to be followed to meet the requirements of the Order. Based on the submission of ZF, [REDACTED]
[REDACTED] for purchase of its shares in Brakes India, [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
23. In relation to ZF's argument about weighing the benefits and harms of granting an extension to ZF, and likely commercial losses to ZF, the Commission observes that the benefits ZF is referring to are unidentified as to who the beneficiaries are; ZF or the consumers and economy. By holding on to the shares in a competing entity, which ZF has to divest at the earliest, the ability of the competing entity to operate autonomously and effectively compete is stifled. The divestment is necessary for protection of the dispersed interest of consumers.
24. The Commission, vide its letter dated 10th November 2020, communicated to ZF that it "*shall endeavour to complete the divestment within the stipulated time to ensure compliance and thus preserve competition in the relevant markets*". Further, vide letter dated 2nd December, 2020, ZF was intimated *inter alia* that "*...Commission finds it appropriate to extend the time for submitting transaction documents [REDACTED]*
[REDACTED] Thereafter, Commission vide its letter dated 18th December 2020, "*...directed ZF to submit all details, including the chronology of events, action plan, if any, devised to complete the Brakes India Divestment within the First Divestiture Period. Further, ZF was directed to furnish all steps and measures taken by it to complete Brakes India Divestment...*"
25. In response to the above multiple communications, in December 2020, ZF submitted that in terms of next steps, [REDACTED]
[REDACTED]
Finally, on 28th December 2020, [REDACTED]
[REDACTED]
26. It is noted that, at the time when ZF submitted its request for extension in November 2020, these developments to consider progress on divestment were absent. Since



negotiations on price can sometimes be endless, the Commission, in view of ZF's submissions until then, could not find reason to grant extension in its letter dated 2nd December 2020.

27. However, [REDACTED] considering the steps taken recently by ZF, including the submission of ZF that on 28th December 2020, [REDACTED] [REDACTED] the Commission is of the considered view that ZF be granted extension [REDACTED] beyond the First Divestiture Period, i.e. till [REDACTED]
28. The Commission will review the interim progress, before deciding further course of action, for which ZF shall submit a progress report on 28th February 2021.
29. The Secretary is directed to communicate the Parties accordingly.