



## COMPETITION COMMISSION OF INDIA

(Combination Registration No. C-2015/07/297)

08.03.2016

### **Order under Section 43A of the Competition Act, 2002 (“Act”) against Baxalta Incorporated (“Baxalta” or the “Acquirer”) in relation to combination registration no. C-2015/07/297**

#### **Introduction**

1. On 30.07.2015, the Competition Commission of India (“**Commission**”) received a notice given by Baxalta (“**Notice**”) in relation to the acquisition of the bioscience business and related assets (“**Target Business**”) of Baxter International Inc. (“**Baxter**”). The Notice was filed pursuant to the execution of a Global Separation and Distribution Agreement (“**GSDA**”) between Baxter and Baxalta on 30.06.2015. Hereinafter, Baxter and Baxalta are collectively referred to as the “**Parties**”.
2. It was submitted in the notice that Baxalta operates in India through two subsidiaries, namely, Baxter India Private Limited (“**BIPL**”) and Gambro India Private Limited (“**GIPL**”). Further, Baxter’s Indian bioscience business and related assets will be transferred to a newly created wholly owned subsidiary of Baxter, viz. Baxalta BioScience (India) Private Limited (“**Baxalta India**”). Thereafter, the ownership and control of Baxalta India will be transferred to Baxalta (hereinafter, the implementation of the India leg of the combination is referred to as the “**India Separation**”).
3. The Commission, in its meeting held on 08.09.2015, considered the proposed combination and approved the same under sub-section (1) of Section 31 of the Act.

#### **Proceedings under Section 43A of the Act**

4. It was observed that the notice for the combination was given on 30.07.2015 i.e. within 30 days of signing of GSDA. However, pursuant to the GSDA, the Target Business was effectively transferred to Baxalta, on 30.06.2015 itself (“**Global Implementation**”), except in certain 'deferred' jurisdictions, including India, where the transfer of the local



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target business will take place at a later date pursuant to local separation agreements. Further, on 01.07.2015, Baxter distributed shares of Baxalta, on a pro rata basis, to its shareholders, cumulatively amounting to 80.50 per cent of Baxalta's shareholding and the remaining 19.50 per cent equity shares were retained by Baxter.

5. In terms of sub-section (2) of Section 6 of the Act, an enterprise, which proposes to enter into a combination, is required to 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. Further, as per sub-section (2A) of Section 6 of the Act, a combination shall not come into effect until 210 days have passed from the date of filing of the notice with the Commission or the Commission has passed any order under Section 31 of the Act, whichever is earlier. In view of the foregoing, it appeared that the combination was effected even before notice was given to the Commission, in contravention of sub-section (2) read with sub-section (2A) of Section 6 of the Act. In view of the above, a show cause notice ("SCN") was issued under Section 43A of the Act read with Regulation 48 of the Competition Commission of India (General) Regulations, 2009 ("**General Regulations**") on 17.09.2015, to show cause, in writing, within 15 days of receipt of the same, as to why penalty, in terms of Section 43A of the Act, should not be imposed on the Acquirer for failure to file notice for the said transaction in accordance with sub-section (2) of Section 6 of the Act. The Acquirer filed its reply to the SCN on 01.10.2015 ("**Response to SCN**") along with a request for personal hearing, in terms of Regulation 48 of the General Regulations.
6. The Commission, in its meeting held on 24.02.2016, considered the Response to SCN and granted a personal hearing to Baxalta as requested. The authorized representative of the Baxalta was heard by the Commission in its meeting held on 08.03.2016. The Commission noted that *vide* their written and oral submissions, the Baxalta made, *inter alia*, the following submissions:
  - 6.1 The Notice was filed within 30 days of the execution of the GSDA, i.e. within the prescribed timeline set out in sub-section (2) of Section 6 of the Act. Accordingly, Baxalta did not fail to file the merger notification as per sub-section (2) of Section 6 of the Act, and therefore, it ought not to be penalized under Section 43A of the Act.



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Further, the India Separation has not come into effect and the Parties only intend to implement the India Separation, at an unidentified date in 2016, pursuant to a separate local implementation agreement. Until such time, the Target Business in India remains a part of the Baxter group. Accordingly, the transaction as set out in the GSDA has no structural effect or impact on any market or any customer in India.

- 6.2 The Commission has, in previous instances of global transactions involving local implementation agreements, considered the local implementation agreement to be the trigger for the notification requirement under sub-section (2) of Section 6 of the Act. In this regard, the Acquirer referred to combination notice bearing registration no. C-2013/01/106. On that basis, the Parties, when considering the notifiability of the transaction in India, were under the bona fide belief that the trigger event for the merger notification in India would be the local implementation agreement for the India Separation. Accordingly, Baxalta approached the Commission under the pre-merger consultation facility on 24.07.2015, and received the Commission's informal clarification that the GSDA would be considered the trigger event. Baxalta acted on the Commission's informal clarification and filed the Notice with the Commission within the prescribed timeline under sub-section (2) of section 6 of the Act.
- 6.3 The Acquirer approached the Commission for a pre-merger consultation and the transaction was notified as soon as possible based on the informal guidance received from the Commission's officials through the pre-merger consultation facility on 24.07.2015.
- 6.4 Prior to the execution of the GSDA, the Parties, in good faith, reviewed the most recent audited financial statements for the year ending 31.03.2014 and on this basis, determined in early June 2015 that Baxter would not have sufficient turnover in India, in order to meet the India nexus test. The total turnover of Baxter in India as at 31.03.2014 was Rs. 592.50 crore, which is significantly below the *de minimis* threshold of Rs. 750 crore as set out in the Government of India notification no. S.O. 482(E) dated 04.03.2011 (“**Target Based Exemption**”), meaning a filing obligation would not arise. It was on this basis that the Parties proceed to plan for the signing and implementation of the GSDA on 01.07.2015. However, the interim unaudited financial statements for each of BIPL and GIPL became available on 25.06.2015, i.e.



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five days before the signing of the GSDA and upon a review of such accounts it was determined that the Target Based Exemption may no longer be applicable and the transaction may require notification to the Commission. Therefore, out of abundant caution and in the spirit of compliance, the Parties approached the Commission to seek informal guidance even though as per the Act, the determination for notification ought to have been made on the basis of the audited financials for the year ended 31.03.2015, which were not available at the time.

- 6.5 The intention of the Act is to prevent practices that have or are likely to have an appreciable adverse effect on competition in India. This is borne out by the wording of several provisions of the Act that relate to merger control, as well. Sub-section (2A) of Section 6 of the Act ought to be interpreted and applied by the Commission in keeping with this intention. It is clear that the legislature did not intend for the Commission to review transactions that have no effect on competition in India. Accordingly, it has been submitted that the Commission should adopt a purposive interpretation of sub-section (2A) of Section 6 of the Act and limit the scope of its review to combinations that have an effect in India. In the present case, the transaction, as set out in the GSDA, has no structural effect or impact on any market or any customer in India.
- 6.6 The transaction was notified to the Commission on the basis of a technicality and that in substance, ought not to have been notifiable at all. There was no change in control as a result of the GSDA and it was effectively an intra-group reorganization of the existing Target Business from Baxter to Baxalta, a newly incorporated entity. The transaction would have been covered by the Item 8 of Schedule I of the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (“**Combination Regulations**”), had it not been for the technicality that the target, i.e. Baxter, and the acquirer, i.e. Baxalta, cannot be considered part of the same "group" (as defined in the Act).
- 6.7 Baxalta acted appropriately in these circumstances and that it would be grossly unfair in the circumstances, particularly as Baxalta proactively sought informal guidance and filed within the 30 day period (unlike in prior cases where there is either a



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material delay in the filing being made and/or there has been implementation involving a material impact on a market in India).

- 6.8 In the past, the Commission has deemed it fit to impose penalties only when the delay was significant (over 70 days at least) and/or where the combination had already taken effect. Even in cases where the combination was held to have been given effect to, the Commission has taken a lenient view and imposed a nominal penalty in cases where the parties themselves disclosed the relevant facts to the Commission and cooperated with the Commission during its review.
7. In this regard, it is noted that sub-section (2) of Section 6 of the Act reads as under:
- “..... 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”*
8. Further, sub-section (2A) of Section 6 of the Act reads as under:
- “No combination shall come into effect until two hundred and ten days have passed from the day on which the notice has been given to the Commission under sub-section(2) or the Commission has passed orders under section 31, whichever is earlier”*
9. Thus, the Commission observed that in terms of sub-section (2) of Section 6 of the Act, an enterprise, which proposes to enter into a combination, is required to 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. Further, as per sub-section (2A) of Section 6 of the Act, a combination shall not come into effect until 210 days have passed from the date of filing of the notice with the Commission or the Commission has passed any order under Section 31 of the Act, whichever is earlier.
10. With respect to the submissions of the Acquirer, as mentioned above, the Commission observed that:



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- 10.1 The words “*proposes*” and “*proposed*” used in sub-section (2) of Section 6 of the Act implies that a combination which is being notified to the Commission under the said section should be a *proposed* combination at the time of filing of the notice with the Commission. In the instant case, the combination was already given effect to on 01.07.2015 i.e. at the time of filing of the Notice with the Commission, it was no longer a *proposed* combination as required by sub-section (2) of Section 6 of the Act.
- 10.2 In addition to this, the Commission further observes that the words “*proposes*” and “*proposed*” used in sub-section (2) of Section 6 have to be read in the context of sub-section (2A) of Section 6 (which suspends the consummation of the proposed combination for the period stated therein). Accordingly, till the expiry of the 210 days from the date of filing of the notice or the Commission has passed an order under Section 31 of the Act, whichever is earlier, a combination should remain a *proposed* combination and parties to the combination should not give effect to the combination. If the parties to the combination are allowed to give effect to the proposed combination either before filing of the notice with the Commission or after filing of the notice but before the expiry of the period given in sub-section (2A) of Section 6 of the Act, then it will tantamount to violation of sub-section (2) of Section 6 of the Act.
- 10.3 In relation to the submission of the Acquirer that there was considerable legal uncertainty as to whether the relevant trigger event would be the GSDA or the local implementation agreement for the India Separation, it is noted that as per sub-section (2) of Section 6 of the Act, a notice in respect of a proposed combination is required to be filed with the Commission within 30 days of execution of any agreement or other document for acquisition. In the instant case, GSDA was a binding document executed between Baxter and Baxalta on 30.06.2015 for the purpose of the combination and thus satisfied the requirements of sub-section (2) of Section 6 of the Act. Thus, the argument of the Acquirer that the trigger event for the merger notification in India would be the local implementation agreement for the India Separation is not valid.



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- 10.4 In this regard, it may also be noted that the authorized representative of the Acquirer, vide its email dated 20.07.2015 (in reference to its request for pre-filing consultation), has stated that *“(t)he legal representatives of Baxter/Baxalta consider that it is the GSDA, which governs the global spinoff and which also exclusively governs the overall terms of the transfer of the local Baxter bioscience businesses and related assets in the deferred jurisdictions such as India, which is the trigger document (and not the relevant local separation agreement, as and when this is executed, which will merely govern the mechanics and timing for implementation of the separation in India).* Thus, the Acquirer’s own submission dated 20.07.2015 makes it clear that the trigger document is GSDA.
- 10.5 Further, the case quoted by the Acquirer, in relation to whether the trigger document should be the GSDA or the local implementation agreement, is not applicable in the instant case as the global agreement in the referred case was executed in 2007 when the provisions relating to regulation of combinations were not in force in India and thus, parties to the combination filed the notice with the Commission after execution of local agreement.
- 10.6 It is also noted that even if the parties to the combination do not enter into a local separation agreement, the acquisition of Target Business by Baxalta would have been notifiable to the Commission in terms of sub-section (2) of Section 6 of the Act on the execution of GSDA, as the parties to the combination meet the jurisdictional thresholds prescribed under Section 5 of the Act. With regard to submission of the Acquirer that the India Separation has not come into effect, the Commission observes that in cases of global combinations (as in the present case), if the parties to the combination notify the combination to the Commission only upon the execution of a local agreement and not after execution of the global agreement, in spite of meeting jurisdictional thresholds prescribed under Section 5 of the Act, then there is possibility that the combination would be consummated at the global level even before the Commission has assessed the same under the relevant provisions of the Act (as has happened in the instant case). In such a situation, the independent market behaviour of the parties to the combination has already ceased



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even before the Commission carried out its assessment of the combination, which would defeat the purpose of the suspensory regime of regulation of combinations provided by Section 5 and 6 of the Act.

10.7 In relation to the submission of the Acquirer that Parties notified the Combination as soon as possible based on the informal guidance received from the Commission's officials, through the pre-merger consultation facility, the Commission observes that as per the provisions of the Act, the duty to determine the notifiability of a transaction under sub-section (2) of Section 6 of the Act, lies with the acquirer in case of acquisition and the merging parties in case of merger or amalgamation. The acquirer/merging parties are statutorily required to notify the Commission about the proposed combination and suspend the consummation of the proposed combination for a period of 210 days or till the time the Commission issues an order under Section 31 of the Act, whichever is earlier. Thus, giving an excuse that notifiability was determined in pre-filing consultation is not a valid ground for delayed filing or giving effect to a combination in contravention of the provisions of sub-section (2) of Section 6 of the Act,

10.8 In relation to the argument of the Acquirer that there was uncertainty as to whether the Target Based Exemption was applicable to the combination, the Commission observes that the Parties have themselves admitted that on the basis of interim unaudited financial statements for each of BIPL and GIPL, which were available on 25.06.2015 (i.e. before execution and implementation of GSDA) they determined that target based exemption is no longer applicable and the combination may require notification to the Commission. Thus, the Acquirer should have suspended the consummation of combination pending approval of the Commission. But instead the Acquirer went ahead and implemented the GSDA in various jurisdictions, despite clear indications that target based exemption is no longer applicable. The Commission also notes that the Acquirer approached the Commission for a pre-filing consultation on 16.07.2015 i.e. approx. 20 days after determining that target based exemption is not applicable to the combination.

10.9 The argument of the Acquirer that the legislature did not intend for the Commission to review combinations that have no effect on competition in India is not tenable, as



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the Commission would be able to formulate an opinion as to whether a combination has or is likely to result in any effect on competition in India, only after conducting its inquiry. Without inquiry, the Commission would not be able to assess the combination for its possible anticompetitive effects in the relevant markets. Similarly, in relation to the contention of the Acquirer that the combination was merely an internal reorganization and the filing with the Commission is only a technicality, the Commission is of the view that the parties to the combination are required to comply with the provisions of the Act and it is a mandatory requirement to seek approval of the Commission before giving effect to a proposed combination. The parties to the combination cannot plead that the filing with the Commission is only a technicality and therefore penalty should not be imposed for violation of a statutory provision.

11. In view of the foregoing, the Commission is of the opinion that the Acquirer failed to give notice to the Commission in accordance with the requirements of sub-section (2) of Section 6 of the Act which attracts penalty under Section 43A of the Act. Section 43A of the Act reads as under:

*“If any person or enterprise who fails to give notice to the Commission under sub-section (2) of section 6, 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.”*

12. As per the details provided by the Parties, the value of their worldwide assets and turnover for the year ending 31.12.2014, are as follows:

<b>Party</b>	<b>Assets</b> <i>(in USD Million)</i>	<b>Turnover</b> <i>(in USD Million)</i>
<b>Baxalta</b>	-	-
<b>Baxter</b>	25,917	16,671

13. Accordingly, in terms of Section 43A of the Act, the Commission can levy a maximum penalty of one per cent of the combined value of worldwide assets of the Parties i.e. USD 259 million (approximately INR 1,700 crore). However, the Commission has sufficient



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discretion to consider the conduct of the Parties and the circumstances of the case to arrive at an appropriate amount of penalty. Accordingly, while determining the quantum of penalty, the Commission considered that there does not seem to be any effort on the part of the Acquirer to conceal the combination as the Parties themselves approached the Commission for a pre-filing consultation. In view of the foregoing, the Commission considered it appropriate to impose a penalty of INR 1,00,00,000/- (INR one crore only) on the Acquirer, which is approximately 0.0005 per cent of the combined value of worldwide assets of the Parties. The Acquirer shall pay the penalty within sixty (60) days from the date of receipt of this order.

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