



08.08.2018

Notice given under Section 6(2) of the Competition Act, 2002 given by Chhatwal Group Trust, Shrem Infraventure Private Limited and Shrem Roadways Private Limited:

Combination Regn. No. C-2018/01/544

CORAM:

Mr. Sudhir Mital
Chairperson

Mr. Augustine Peter
Member

Mr. U. C. Nahta
Member

Appearances during Oral hearing on 08.08.2018 for Chhatwal Group Trust, Shrem Infraventure Private Limited and Shrem Roadways Private Limited:

Ms Daizy Chawla, Advocate and Ms Vijaya Singh, Advocate

Order under Section 43A of the Competition Act, 2002

A. Background

1. On 02.01.2018, the Competition Commission of India (hereinafter referred to as the “**Commission**”) received a notice (“**Notice**”), under Section 6(2) of the Competition Act, 2002 (“**Act**”), filed by Chhatwal Group Trust (“**CGT**”), Shrem Infraventure Private Limited (“**SIPL**”) and Shrem Roadways Private Limited (“**SRPL**”) (collectively “**Acquirers**”). The notice related to proposed acquisition of entire share capital of 23 special purpose vehicles and wholly owned subsidiaries (“**Target Entities**”) of Dilip Buildcon Limited (“**DBL**”) by CTG through SIPL and/or SRPL (“**Combination**”) pursuant to the Master Agreement dated 18.12.2017 (“**MA**”). The MA was entered in two parts, viz., Part A executed by and between SIPL, SRPL and DBL and Part B executed by



and between SIPL and DBL (hereinafter the Acquirers and DBL are collectively referred to as the “Parties”).

2. On 19.02.2018, the Commission approved the Combination by passing an order under Section 31(1) of the Act (“Order”). However, the Order was passed without prejudice to any proceedings under Section 43A of the Act.

B. Initiation of proceedings under Section 43A of the Act

3. During the review of the Combination, the Commission noted that prior to execution of the MA, CGT and DBL had entered into two indicative Term Sheets each dated 24.08.2017 for the purpose of the Combination and after entering into the aforesaid Term Sheets, SIPL and SRPL made the payment of Transaction Advance to DBL respectively amounting to INR 70 Crore on 27.09.2017 and INR 50 Crore on 24.10.2017. The Commission formed a *prima facie* opinion that such pre-payment of consideration by the Acquirers amounts to consummating a part of the Combination before filing notice of the Combination with the Commission and consequently before the Commission passed an order on the Combination under Section 31 of the Act. Accordingly, a show cause notice dated 13.04.2018 was issued to the Acquirers under Section 43A of the Act read with Regulation 48 of the Competition Commission of India (General) Regulations, 2009 (“General Regulations”) (“SCN”). The SCN required the Acquirers 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 them for failure to file notice of the Combination in accordance with Section 6(2) of the Act and consummating a part of the Combination before expiry of time period stipulated under Section 6(2A) of the Act. The Acquirers filed their reply to the SCN on 15.05.2018 (“Response to SCN”) along with a request for oral hearing in terms of Regulation 48 of the General Regulations.



4. In its meeting held on 07.06.2018, the Commission considered the Response to SCN and decided to grant an oral hearing to the Acquirers on 26.06.2018. After two requests for adjournment by the Acquirers, the Commission finally heard them on 08.08.2018.

C. Submissions of the Acquirer

5. In the Response to SCN and during oral submissions, the Acquirers contended the following:

Sequence of events leading to filing of the Notice

- 5.1 That on 02.08.2017, the Board of Directors of DBL evaluated the disinvestment in Target Entities with the view to bring the focus of DBL on providing EPC services, generate shareholder value *etc.*;
- 5.2 That on 24.08.2017, CGT and DBL entered into two definitive term Sheets;
- 5.3 That CGT Group, chosen to be the prospective investor in the disinvestment strategized by DBL, pursuant to entering into Term Sheets, advanced the token money of INR 70 Crore on 27.09.2017 and INR 50 Crore on 24.10.2017 to DBL.
- 5.4 That on settling of negotiation and finalization of the terms and conditions, the Parties entered into MA on 18.12.2017, which was the binding agreement detailing commitment of Acquirers to acquire the assets and the manner in which such acquisition was to be undertaken, based on which the Acquirers filed the Notice.

The Combination was subjected to various conditions precedent

- 5.5 That as enumerated in the Term Sheets and the MA, the Combination was subjected to various conditions precedent including approval of the Commission, shareholders, lenders and of other regulatory authorities.



The Transaction Advance was refundable

- 5.6 That as per the MA, the advanced amount has been treated as amount due and immediately repayable if the Combination were not to come into effect.

No acquisition of control etc.

- 5.7 That by advancing the token amount, the Acquirers have not been given: (a) any control over the Target Entities or DBL; and (b) any right to nominate representative(s) on the Board of the Target Entities.
- 5.8 That after entering into the Term Sheets and signing of the MA, the physical structures and competitive conditions of the Parties remained unchanged.
- 5.9 That there was no transfer of assets or any influence of the Parties on each other, neither was there any exchange of competition-sensitive information other than that strictly required for drafting of the MA.
- 5.10 That there were no covenants between the Parties with respect to non-compete against each other if need be.
6. Based on the above, the Acquirers submitted that the payments made to DBL cannot be treated as part consummation of the Combination.

D. Analysis and Findings of the Commission

7. The Commission has noted the submissions of the Acquirer regarding filing of Notice on the basis of the MA. The Acquirers have emphasized that the MA was the binding agreement detailing commitment of Acquirers to acquire Target Entities.



8. At the outset, it would be appropriate to lay down the basic contours of gun jumping consistent with the provisions of the Act. The Act envisages *ex-ante* regulation of combinations. Section 6(1) of the Act prohibits combination that causes or is likely to cause appreciable adverse effect on combination and Section 6(2) of the Act obliges parties to the combination to give notice to the Commission in respect of their proposed combination. Further, Section 6(2A) of the Act provides that a combination notified to the Commission shall not come into effect for a period of 210 days from the date of notification or the approval of the Commission, whichever is earlier. For ease of reference, relevant extract of these provisions is reproduced below:

Section 6(1) – “No person or enterprise shall enter into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination shall be void.”

Section 6(2) – “Subject to the provisions contained in sub-section (1), any person or enterprise, who or which proposes to enter into a combination, shall give notice to the Commission, in the form as may be specified, and the fee which may be determined, by regulations, disclosing the details of the proposed combination, within thirty days of”

Section 6(2A) – “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. In order to enforce the above provisions, including the *ex-ante* obligation of the parties thereunder, Section 43A was inserted into the Act, by way of an amendment in 2007, to empower the Commission to impose penalty in cases where parties fail to give notice in terms of Section 6(2) of the Act. Section 43A of the Act reads as under:



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“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 percent, of the total turnover or the assets, whichever is higher, of such a combination.”

10. The Hon’ble Supreme Court of India, in *SCM Soilfert Limited & Anr. v. Competition Commission of India* [Civil Appeal No(S). 10678 of 2016], had the occasion to deal with the scheme of ex-ante merger control under the Act. The relevant extracts are reproduced below:

“19. The expression “proposes to enter into a combination” in section 6(2) and further details to be disclosed in the notice to the Commission are of the ‘proposed combination’ and the specific provisions contained in section 6(2A) of the Act provides that no combination shall come into effect until 210 days have passed from the date on which notice has been given or passing of orders under section 31 by the Commission, whichever is earlier. The intent of the Act is that the Commission has to permit combination to be formed, and has an opportunity to assess whether the proposed combination would cause an appreciable adverse effect on competition. In case combination is to be notified ex-post facto for approval, it would defeat the very intendment of the provisions of the Act”.

11. The scheme and purpose of the Act is to provide an opportunity to the Commission to evaluate the likely effects of the proposed combination on competition and regulate them appropriately. If parties to the combination deny this statutory opportunity provided to the Commission, the same would attract penalty under Section 43A of Act.
12. The Commission in the past has also considered a related issue of timing of the conduct being investigated for gun jumping being prior to signing of definitive agreements and the claim of the parties that such conduct cannot amount to gun jumping in Combination Reg. No. C-2015/02/246 (*In Re: UltraTech Cement Limited*) in accordance with the provisions of the Act. The Commission, in its order dated 12.03.2018 in the said matter, passed under



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Section 43A of the Act, considered the application of provisions of the Act to the issues of gun jumping and observed that,

“The substantive issue involved is that of the conduct of the parties to a combination and not only that of timing of conduct. Going by the arguments of the Acquirer, it would imply that parties, during the stage of negotiations, may enter into cooperation on any commercial/financial/marketing aspects leading to integration of their operations and yet claim that the conduct cannot amount to gun jumping, as it occurred prior to the execution of definitive agreements or filing of notice. Hence, what is critical in such cases is determination of the fact whether the alleged conduct is pursuant to the combination and has the effect of consummating a part of a combination and not the timing of the same.”

13. Accordingly, considering the provisions of the Act and the decisional practice of the Commission, what is relevant in this case is determining whether the payment of Transaction Advance was pursuant to the Combination and has the effect of consummating the Combination or any part thereof without approval, express or implied, from the Commission.
14. As regards whether payment of Transaction Advance is pursuant to the Combination or not, the Commission observed that the Acquirers have themselves stated that CGT Group, chosen to be the prospective investor in the disinvestment strategized by DBL, pursuant to entering into Term Sheets, advanced the token money of INR 70 Crore on 27.09.2017 and INR 50 Crore on 24.10.2017. Based on submissions of the Acquirers, it is clear that payment of Transaction Advance was pursuant to the Combination.
15. As regards pre-payment of consideration amounting to consummation of a part of a combination, in the past, Commission has issued three orders dated 14.09.2016 in Combination Reg. No. C-2015/08/299 (*In Re: Hindustan Colas Private Limited*), 12.03.2018 in Combination Reg. No. C-2015/02/246 (*In Re: UltraTech Cement Limited*) and 30.07.2018 in Combination Reg. No. C-2018/01/547 (*In Re: Adani Transmission Limited*), under Section 43A of the Act, clarifying that pre-payment of consideration, in



part or full, amounts to contravention of the obligations contained in Section 6(2) read with section 6(2A) of the Act.

16. The Commission observed that the submissions of the Acquirers in the Response to SCN, on the aspect of pre-payment of consideration amounting to part consummation of the Combination, centre on the payment of Transaction Advance being refundable, the transaction not having been consummated, no acquisition of control over Target Entities by the Acquirer and no change in physical structures of the parties to the Combination. The Commission observed that the issues raised by the Acquirers in Response to SCN have already been considered at length by the Commission in the order dated 14.09.2016 in Combination Reg. No. C-2015/08/299. The Commission had observed:

“6.9 ...The Commission noted that pre-payment of price (whether refundable/non-refundable) may have a number of competition distorting effects viz., (i) it may lead to a strategic advantage for the Acquirer; (ii) it may reduce the incentive and will of ‘target’ to compete; and (iii) it may become a reason/basis to access the confidential information of the ‘target’. On an overall basis, it may be said that pre-payment of consideration may have the impact of creating a tacit collusion which may cause an adverse effect on competition even before consummation of the combination. Thus, the Commission is of the opinion that what is important is pre-payment of consideration and solely the fact of the same being refundable or otherwise is not relevant...

- 6.11 The Acquirer further submitted that the refundable deposit had not resulted into any benefits or control to Hindustan Colas other than showcasing their commitment to SIMPL towards the Combination. It has also been submitted that there were other potential buyers competing for the same asset, it was felt necessary and commercially expedient to pay this deposit to demonstrate their earnestness in acquiring the asset. In this regard, as noted above, this type of arrangement is potentially likely to facilitate tacit collusion which is considered to be a worst form*



of collusion and therefore cannot be allowed. The Act mandates the Commission to examine combinations ex-ante and therefore the issues such as whether the parties actually benefitted or not from the impugned conduct or whether there were any commercial exigencies behind a particular conduct may not be relevant to the determination of provisions of Section 6(2) and 6(2A) of the Act.

6.12 The Acquirer has made references to suggest that the Combination was not consummated and no steps had been taken to integrate the businesses before the approval of the Commission. In this regard, the Commission observed that it has never been alleged that the entire combination has been consummated, what was alleged was that pre-payment of consideration has the effect of consummating a part of the Combination before the approval of the Commission. Thus, the submissions of the Acquirer on this aspect are not considered as relevant.”

17. Thus, in view of the foregoing, the Commission observed that the payment of INR 120 Crore as Transaction Advance, amounts to consummating a part of the Combination in contravention of Section 6(2) read with Section 6(2A) of the Act.
18. Having concluded a contravention of Section 6(2) of the Act, the Commission can impose penalty that may extend to one percent of the total turnover or the assets, whichever is higher, of the combination. However, the Commission has sufficient discretion to consider the conduct of the parties and the circumstances of the case to arrive at appropriate amount of penalty. Accordingly, while determining the quantum of penalty, the Commission, considered the fact that the Acquirers had voluntarily disclosed all the information and cooperated fully with the Commission. In view of the foregoing, the Commission considered it appropriate to impose a nominal penalty of INR 10,00,000/- (Indian Rupees Ten Lakhs only) on the Acquirers.
19. The Acquirers shall pay the penalty within sixty (60) days from the date of receipt of this order.



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