



**COMPETITION COMMISSION OF INDIA**  
(Combination Registration No. C-2013/06/124)

**01.08. 2013**

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

- Zulia Investments Pte. Ltd.
- Kinder Investments Pte. Ltd.

1. On 6<sup>th</sup> June, 2013, the Competition Commission of India (hereinafter referred to as the “**Commission**”) received a notice under sub-section (2) of Section 6 of the Competition Act, 2002 (hereinafter referred to as the “**Act**”), given by Zulia Investments Pte. Ltd. (hereinafter referred to as “**Zulia**”) and Kinder Investments Pte. Ltd. (hereinafter referred to as “**Kinder**”), both indirect wholly owned subsidiaries of Temasek Holdings (Private) Limited (hereinafter referred to as “**Temasek**”) (hereinafter Zulia, Kinder and Temasek are collectively referred to as the “**Acquirers**”), in relation to a proposed acquisition of 439,000,000 new ordinary shares of DBS Group Holdings Ltd. (hereinafter referred to as “**DBSH**”). As the abovesaid notice was given to the Commission beyond the time limit as prescribed under sub-section (2) of Section 6 of the Act, Zulia and Kinder also filed an application requesting for condonation of delay in giving the notice.
2. As per the information provided in the notice, it is observed that the aforementioned proposed acquisition followed from and was a result of the Share Purchase Agreement (hereinafter referred to as the “**SPA**”), dated 2<sup>nd</sup> April, 2012, executed between Fullerton Financial Holdings Pte Ltd (hereinafter referred to as “**Fullerton**”), an indirect wholly owned subsidiary of Temasek, and DBS Group Holdings Ltd (hereinafter referred to as “**DBSH**”), whereby Fullerton agreed to sell and DBSH agreed to purchase, 100 per cent of the issued share capital in Fullerton’s



direct wholly owned subsidiary, Asia Financial (Indonesia) Pte. Ltd., which in turn, held approximately 67.37 per cent of the equity share capital of an Indonesian Bank, PT Bank Danamon Indonesia Tbk.

3. Pursuant to the terms of the said SPA, in satisfaction of the consideration for the 100 per cent acquisition of Asia Financial (Indonesia) Pte. Ltd., DBSH was to issue 439,000,000 new ordinary shares in DBSH to Fullerton or Temasek or such other wholly owned subsidiaries of Temasek or their respective nominee(s) holding on their behalf, as Fullerton might direct DBSH. As stated in the notice, thereafter, as per the terms of the SPA, an Undertaking Agreement, dated 13<sup>th</sup> May, 2013 was executed between Fullerton, Zulia and Kinder, in which Zulia was to receive 219,400,000 new ordinary shares of DBSH and Kinder was to receive 219,600,000 new ordinary shares of DBSH. Accordingly, as stated in the notice, in terms of the SPA, Fullerton vide letter dated 13<sup>th</sup> May, 2013 directed DBSH to issue the respective shares to Zulia and Kinder on the date of completion of the SPA.
4. It is stated in the notice that based on the SPA, being the binding document, the notice, in terms of sub-section(2) of Section 6 of the Act, ought to have been filed by the Acquirers by 2<sup>nd</sup> May, 2012. However, the said notice had been given by Zulia and Kinder to the Commission only on 6<sup>th</sup> June, 2013, with a delay of around 399 days.
5. The Commission, in its Ordinary meeting held on 18<sup>th</sup> June, 2013, considered the said belated notice along with the application for condonation of delay and inter-alia decided to admit the belated filing in terms of Regulation 7 of the Combination Regulations, without prejudice to the action that may be taken under Section 43A of the Act. The Commission in the said meeting 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 in sub-section (2) of Section 6 of the Act. It was also decided



by the Commission that the period of thirty days and two hundred and ten days as mentioned in sub-regulation (1) of Regulation 19 of the Combination Regulations and sub-section (2A) of Section 6 of the Act respectively, shall be computed from the day on which the belated notice was admitted by the Commission.

6. In terms of Regulation 14 of the Combination Regulations, vide letter dated 20<sup>th</sup> June, 2013, the Acquirers were required to remove certain defects and provide information/document(s). The response of the Acquirers was received on 5<sup>th</sup> July, 2013. As the said response of the Acquirers continued to have defects, therefore, on 10<sup>th</sup> July, 2013 another letter in terms of Regulation 14 of the Combination Regulations was issued to the Acquirers, to remove the continuing defects and provide information/document(s). The response of the Acquirers was received on 22<sup>nd</sup> July, 2013. In their response dated 22<sup>th</sup> July, 2013, the Acquirers, inter-alia, also submitted that 144,355 non-voting preference shares were acquired by Maju Holdings Pte. Ltd (hereinafter referred to as “**Maju**”), a direct wholly owned subsidiary of Temasek, by way of an election for a scrip dividend in July 2011 and that Maju was not aware that the de-minimis acquisition of such non-voting preference shares by way of scrip dividend in July 2011 would trigger any requirement to make a prior notification under sub-section (2) of Section 6 of the Act, to the Commission. The Acquirers have also submitted that the increase in Maju’s shareholding in DBSH from 15.23 per cent to 15.32 per cent on 5<sup>th</sup> July, 2011 was only in the nature of a de minimis acquisition by way of an election of scrip dividend, which took place two years ago when the Indian merger control regime was in the early stages of implementation and there was a lack of awareness of the filing requirements in India amongst the global foreign companies.
7. The Acquirers, vide their letter dated 5<sup>th</sup> July, 2013, filed in terms of Regulation 16 of the Combination Regulations, also informed the Commission of certain changes in the information provided in the notice. The Commission in its meeting held on 10<sup>th</sup> July, 2013, considered the said changes, as intimated by the Acquirers, vide



application dated 5<sup>th</sup> July, 2013, under Regulation 16 of the Combination Regulations, noted the changes and took them on record, as these would not affect the factors for the determination of any appreciable adverse effect on competition.

8. As per the directions of the Commission, a show cause notice dated 20<sup>th</sup> June, 2013, under Section 43A of the Act and Regulation 48 of the General Regulations, was issued to the Acquirers 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 not having filed the notice within the time prescribed in sub-section (2) of Section 6 of the Act. The response to the show cause notice was filed by the Acquirers on 5<sup>th</sup> July, 2013, wherein it was inter-alia submitted that:

*Before the signing of the SPA and after the SPA was signed, Temasek, through their legal counsel, had taken all necessary steps to check with the first set of Indian counsel about the regulatory approvals which would be required for the Proposed Transaction. Unfortunately, Temasek was, wrongly, not advised about the possibility of a notification under Sections 5 and 6 of the Competition Act by their first set of Indian counsel;*

*Temasek learnt of the possibility of the 30-day requirement under Section 6(2) of the Competition Act applying to the Proposed Transaction only during the course of advice received on another separate and unrelated matter in April 2013;*

*Upon getting confirmation from the second set of Indian counsel, Temasek took immediate steps to collate the necessary information and prepare the Notification Form. The Acquirers have expeditiously and voluntarily filed the Notification Form as soon as they became aware of the 30-day requirement to notify the Proposed Transaction with the Hon'ble Commission;*

*No part of the Proposed Transaction has yet been consummated; and*



*The Proposed Transaction is an entirely offshore transaction and this is the first merger notification made by the Acquirers in India.*

*As Temasek and the Acquirers, wrongly, received incomplete and hence erroneous legal advice from their first Indian counsel, the acts and omissions of the Acquirers have not been guided by any mala fide intention and they have voluntarily filed the Notification Form as soon as possible after they have become aware of the requirement to file under Section 6(2) of the Competition Act. Accordingly, as a goodwill gesture, the Hon'ble Commission is requested to take a lenient view in the current circumstances to kindly condone the delay and not impose any penalty under Section 43A of the Competition Act.*

*Without prejudice to the above, in the event the Hon'ble Commission is not agreeable to the submission of the Acquirers not to impose any penalty, it is most humbly requested that, in keeping with the principle of proportionality, the Hon'ble Commission may be pleased to impose a nominal amount as a symbolic or a token penalty for the delayed filing, giving due weight to the strong mitigating factors as set out above before coming to a final conclusion on the penalties.*

9. In its ordinary meeting held on 10<sup>th</sup> July, 2013, the Commission considered the said reply and directed that the Acquirers or their authorised representatives shall be required to appear, in person, before it, on 25<sup>th</sup> July, 2013, at 10:30 AM, to present their case as to why penalty in terms of Section 43A of the Act should not be imposed upon the Acquirers, for not having filed the notice within the time prescribed in sub-section (2) of Section 6 of the Act. Accordingly, a letter was sent to the Acquirers and their authorised representatives on 12<sup>th</sup> July, 2013 requiring them to appear before the Commission on the appointed date. The authorised representatives acting on behalf of the Acquirers, vide letter dated 22<sup>nd</sup> July, 2013, sought an adjournment of the hearing by one week and requested the Commission to re-schedule the date of hearing



to 1<sup>st</sup> August, 2013. The Commission considered the said request and directed that the Acquirers or their authorised representatives shall be required to appear, in person, before it, on 1<sup>st</sup> August, 2013, at 10:30 AM, to present their case as to why penalty in terms of Section 43A of the Act should not be imposed upon the Acquirers, for not having filed the notice within the time prescribed in sub-section (2) of Section 6 of the Act. Accordingly, a letter was sent to the Acquirers and their authorised representatives on 24<sup>th</sup> July, 2013 requiring them to appear before the Commission on the appointed date.

10. The Acquirers, during the course of the personal hearing before the Commission held on 1<sup>st</sup> August, 2013, informed the Commission that DBSH on 31<sup>st</sup> July, 2013 had made an announcement in the Singapore Stock Exchange to the effect that the SPA pertaining to the proposed combination would lapse after 1<sup>st</sup> August, 2013. The Acquirers also informed the Commission that since the said SPA would terminate and the proposed transaction would not proceed, therefore, the Acquirers wished to withdraw the notice filed with the Commission on 6<sup>th</sup> June, 2013 and also request the Commission to terminate the proceedings initiated against the Acquirers under Section 43 A of the Act.
11. The Commission noted the aforementioned development regarding the notice to the effect that the proposed combination would not take place and the proceedings under the Act, relating to the proposed combination, will be terminated in terms of Regulation 17 of the Combination Regulations, with effect from 1<sup>st</sup> August, 2013 i.e. the date on which the Commission was intimated by the Acquirers that the said notice is being withdrawn by them.
12. The Acquirers also made additional submissions vide their letter dated 1<sup>st</sup> August, 2013 in which inter-alia they mentioned that Temasek, at no point of the time, was informed by its counsels or by the counsels of DBSH regarding the time limit of thirty days, within which the notice with respect to a proposed combination, is required to be filed under the provisions of sub-section (2) of Section 6 of the Act. It may be relevant



to mention here that the Commission in an earlier order<sup>1</sup> had categorically stated that “under the provisions 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 “(a) approval of the proposal relating to merger or amalgamation, referred to in clause (c) of Section 5, by the board of directors of the enterprises concerned with such merger or amalgamation, as the case may be; (b) 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 Commission had reiterated the provisions of sub-section (2) of Section 6 of the Act in the said order, with a view to make the stakeholders aware of the statutory requirement of mandatorily giving a notice to the Commission regarding a proposed combination. It is, therefore, observed that had the Acquirers been vigilant of the said provisions of the Act and the observations made by the Commission in the abovesaid order regarding the regulatory compliance of giving a prior notice of the proposed combination to the Commission, such a delay on the part of the Acquirers, in giving the notice, in the present case, could have been averted.

13. Notwithstanding the termination of the of the proceedings relating to the proposed combination in terms of Regulation 17 of the Combination Regulations, with effect from 1<sup>st</sup> August, 2013, consequent to the aforementioned development as intimated by the Acquirers, the Commission noted that the delay of 399 days in giving the notice under sub-section (2) of Section 6 of the Act is an admitted fact, and the violation of sub-section (2) of Section 6 of the Act by the Acquirers is therefore beyond dispute. The only point for decision is the nature and quantum of penalty to be imposed on the Acquirers under the provisions of Section 43A of the Act. The Commission, therefore, decided to take up the proceedings regarding the imposition of penalty under Section 43A of the Act.

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<sup>1</sup> In the matter bearing Combination Registration No. C-2012-02-40, issued on 12<sup>th</sup> April, 2012.



14. In deciding about the penalty under Section 43A of the Act, the Commission has to consider the implications of a violation of sub-section (2) of Section 6 of the Act, read with other relevant provisions of the Act, as also what could be the mitigating and/or aggravating factors. This decision has to be taken in the backdrop of the Commission's approach to regulation of combinations. The Commission's approach in dealing with combination notices is quite clear. We consider inorganic growth through combinations as a positive business strategy for the economy that deserves due support, and the analysis at the prima facie stage focuses on quickly sifting out only those few cases where competition concerns may require a more in-depth inquiry in phase II. So far, all the combination notices have been approved at the prima facie stage itself in less than thirty days. As it is, the Act has laid down high thresholds of assets/turnover, above which only the parties to the proposed combination are required to file a notification. This implicitly means that only a limited number of combinations are required to be notified, and these cases involve big companies with substantial resources, including MNCs with multi-jurisdictional operations. The Commission has also put in place an effective pre-notification consultation mechanism to assist the parties in clarifying any issues in case of any doubts.
15. In the above backdrop, it is expected that the parties must demonstrate a high sense of responsibility in filing combination notifications within the prescribed time limit, after effective and bonafide due diligence. This becomes even more important in view of the fact that sub-section (1) of Section 20 of the Act prevents the Commission from initiating any inquiry after the expiry of one year from the date on which a combination, which has not been notified, takes effect. Therefore, the possibility of a combination which may actually cause appreciable adverse effect on competition (AAEC), escaping the scrutiny of the Commission, in case the parties do not file the mandatory notification, is real and cannot be ruled out notwithstanding any internal systems within the Commission to discover such cases within one year. Even in cases



which come to the notice of the Commission before the expiry of this one year, there could be problems in case the combination has been consummated, since restoring the original position may be as difficult as unscrambling an omelette. In the present case itself, if the parties had been able to consummate the combination within thirty days of the agreement, the Commission would not have been able to inquire into the case, since it would have no jurisdiction to do so after 395 (30 + 365) days, while the notification in this case has been filed after 399 days.

16. The various mitigating factors submitted by the parties have to be, therefore, assessed in the above backdrop of the seriousness of the violation itself. The failure to file cannot be treated as a routine compliance default, as it could potentially have the grave consequence of defeating the very purpose of providing for regulation of combinations. It is, therefore, imperative for the companies to understand and appreciate the full extent of their responsibility for complying with the requirement of timely filing of the notifications regarding proposed combinations under sub-section (2) of Section 6 of the Act.
17. It has been submitted by the Acquirers that the delay in giving the notice to the Commission was due to their acting on an erroneous legal advice. In this regard the Commission observes that there is full clarity in the provisions relating to regulation of combinations as contained in the Act and the Combination Regulations, including the provisions under sub-section (2) of Section 6 of the Act relating to the time limit within which any person or enterprise who or which proposes to enter into a combination shall give notice to the Commission. Therefore, the plea of the Acquirers that they were not familiar with the thirty day notification requirement, does not hold ground. Further, the Acquirers have also submitted that when a combination is abandoned, the very purpose and basis of the Commission's inquiry is extinguished and an assessment of the likely competition concerns arising in such a case would become a moot point. In this regard the Commission observes that the regulatory compliance in terms of timely filing of the notice of the proposed combination and the ultimate fate of the transaction are two entirely



different issues, and the provisions of the Act are also very clear on this aspect. It may be noted that whereas sub-section (2) of Section 6 of the Act prescribes the period in which any person or enterprise who or which proposes to enter into a combination shall give notice to the Commission, the power to impose penalty for non-furnishing of information on combinations under Section 43A of the Act has been kept with a purpose that all the combinations, before they have been given effect to, are notified for review by the Commission. The above two provisions of the Act address two different issues precisely depicting the fact that timely filing and the ultimate fate of the deal are two separate issues, with the parties being responsible for the filing, and the Commission being responsible for assessing whether the proposed combination is likely to have AAEC.

18. Based on the documents on record, the Commission observes that during the period March 2012 to April 2012, when Temasek was in discussion with its counsels on the course of the regulatory approvals, there had been no mention of regulatory compliance with the competition law in India, notwithstanding the fact that the obligation to give notice under sub-section (2) of Section 6 of the Act rested with Temasek. Further, for the period between May 2012 to December 2012, no records have been submitted to show whether Temasek continued to communicate with their counsels on regulatory compliance of the competition law in India. It is also observed that it was DBSH, which informed Temasek regarding the filing requirements of the proposed transaction. The Commission also observes from the e-mail dated 17<sup>th</sup> January, 2013, sent by the counsel of DBS Singapore to the counsel of Temasek Singapore, that although Temasek was informed by the counsels around mid January 2013 that pre-notification with respect to the proposed combination was required under the provisions of the Act, nevertheless the Acquirers finally gave notice to the Commission after a further lapse of around five months. It is also noted from the e-mail dated 28<sup>th</sup> January, 2013 sent by Temasek Indian counsel to the Temasek Singapore counsel, that Temasek was also informed by their counsels



that a request for pre-filing consultation could be made to the officials of the Commission to understand the filing requirement, within the scope of the law, in context of the facts and circumstances of the present case and nature of the proposed combination. It seems, however, that notwithstanding the legal advice, Temasek did not comply with the regulatory mandate within the time limit as provided under the Act, with respect to the proposed combination. All the above factors signify that the Acquirers did not show any sense of urgency or seriousness on the issue of regulatory compliance pertaining to the Indian Competition Law and were slow in response to the advice of their counsels at different points of time. On going through the above relevant e-mails, it also appears that there was a piecemeal exchange of information between the Acquirers and their counsels and that too with no communication between them during the period May 2012 to December 2012, adding to the delay on the part of the Acquirers in giving the notice under sub-section (2) of Section 6 of the Act. The Commission also observes that Temasek and DBSH have been operating in India, inter-alia in the banking and financial sectors, for a reasonably long time and, therefore, they are not new to the prevalent Indian regulatory provisions and requirements. Further, it is also observed as regards the plea of the Acquirers that no part of the proposed combination had so far been consummated that, as per the terms of the SPA, the Acquirers could not in any case have consummated the proposed combination, as the same was to be done along with the primary acquisition of Asia Financial (Indonesia) Pte. Ltd, which in turn held approximately 67.37 per cent of the equity share capital of an Indonesian Bank, PT Bank Danamon Indonesia Tbk, by DBSH. As observed above, an earlier transaction in July 2011 involving a direct wholly owned subsidiary of Temasek was also not notified to the Commission under sub-section (2) of Section 6 of the Act.

19. Having carefully considered all relevant factors, including the seriousness of the violation, the various submissions of the Acquirers, the mitigating as well as the aggravating factors etc, the Commission decides that the submission of the Acquirers for not levying any penalty



under the provisions of Section 43A of the Act for not giving notice to the Commission within the time prescribed under the provisions of sub-section (2) of Section 6 of the Act is not agreed to, and an appropriate penalty needs to be imposed on the Acquirers.

20. As per the details provided in the notice, the value of assets and turnover of the Acquirers and DBSH are as follows:

<b>Details of Assets and Turnover</b>		
<b>Enterprise(s)</b>	<b>Asset</b>	<b>Turnover</b>
<b>Zulia</b>	0	0
<b>Kinder</b>	0	0
<b>Temasek*</b> (in SGD million)	302600	83500
<b>DBSH**</b> (in SGD million)	340847	7631
<b>DBSH* (in India)</b> <b>(in INR crores)</b>	36386	1063

\*for the financial year ended 31.03.2012 \*\*for the financial year ended 31.12.2011

21. In terms of Section 43A of the Act, if any person or enterprise who 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. It is therefore observed that in terms of Section 43A of the Act, the maximum penalty that may be imposed on the Acquirers could be one per cent of the total combined assets of the combination of the Acquirers and DBSH, as depicted in the table above. However, considering the response of the Acquirers to the show cause notice, submissions made by the Acquirers through their legal representatives in the course of the personal hearing before the Commission held on 1<sup>st</sup> August, 2013, additional submissions made on 1<sup>st</sup> August, 2013 by the Acquirers, particularly the fact that the Acquirers had voluntarily given the notice under sub-section (2) of Section 6 of the Act before the consummation of the combination, and also the fact that the proposed combination was pursuant to an acquisition of the shareholding of one foreign enterprise by another foreign enterprise, the Commission considers it appropriate to impose a penalty of INR 50,00,000/- (INR Fifty Lakhs only) on the Acquirers. The Acquirers shall



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pay the penalty within sixty (60) days from the date of receipt of this order.

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

(Ashok Chawla)  
Chairperson

(Geeta Gouri)  
Member

(Anurag Goel)  
Member

(M. L. Tayal)  
Member

(S.N. Dhingra)  
Member

(S.L. Bunker)  
Member