



सत्यमेव जयते



Fair Competition  
For Greater Good

## COMPETITION COMMISSION OF INDIA

### Combination Registration No. C-2022/12/995

18<sup>th</sup> August 2023

***In re: Proceedings against Platinum Jasmine A 2018 Trust, acting through its trustee Platinum Owl C 2018 RSC Limited, and TPG Upswing Ltd. under Sections 43A and 44 of the Competition Act, 2002***

#### **CORAM:**

Ms. Sangeeta Verma  
Member

Mr. Bhagwant Singh Bishnoi  
Member

#### **Appearances during the hearing:**

*For Acquirers* : Mr. Rajshekhar Rao, Senior Advocate with Ms. Meherunissa Anand, Ms. Manasa Dammalapati, Mr. Toshit Shandilya, Mr. Sanjeev Kumar, Ms. Nandini Modi, Advocates along with Mr. William Cates Turner Herbert, Mr. Ayush Agarwal and Mr. Ombeer Tyagi, representatives of Abu Dhabi Investment Authority, TPG, and UPL, respectively.

#### **Order under Sections 43A and 44 of the Competition Act, 2002**

1. This order shall dispose of the proceedings under Section 43A and 44 of the Competition Act, 2002 (**Act**) and Regulation 5A(2) and 8(2) of the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (**Combination Regulations**) against Platinum Jasmine A 2018 Trust (**Platinum Trust**), acting through its trustee Platinum Owl C 2018 RSC Limited (**Platinum Trustee**), and TPG Upswing Ltd. (**TPG Upswing**) [collectively, **Acquirers**] in relation to the combination comprising acquisition of stake in UPL Sustainable Agri Solutions Limited (**UPL SAS**) by Platinum Trust and TPG Upswing through the Upswing Trust.

#### **Introduction**

2. On 20<sup>th</sup> December 2022, the Competition Commission of India (**Commission**) received a notice (**Notice**) jointly given by Platinum Trust, acting through Platinum Trustee, and TPG Upswing in relation to the combination comprising acquisition of stake in UPL SAS by Platinum Trust and TPG Upswing through the Upswing Trust.



## **Notifying Parties**

### *Platinum Trust*

3. It has been submitted that Platinum Trust is established under the laws of the Abu Dhabi Global Market (**ADGM**) by a deed of settlement dated 27<sup>th</sup> January 2019. The Abu Dhabi Investment Authority (**ADIA**) is the sole beneficiary and settlor of the trust. ADIA is a public institution established as an independent investment institution by the Government of the Emirate of Abu Dhabi. ADIA manages a global investment portfolio across more than two dozen asset classes and subcategories, including developed equities, emerging market equities, small cap equities, government bonds, credit, fixed income, real estate, infrastructure, private equity, cash and alternatives.
4. It has been submitted that Platinum Trustee, a restricted scope company, is incorporated in the ADGM. It is acting in its capacity as trustee for Platinum Trust. Apart from making investments in its capacity as trustee for Platinum Trust, it does not directly carry out any business activities in India.

### *TPG Upswing*

5. It has been submitted that TPG Upswing is part of the TPG Group. TPG Inc. is the ultimate holding company of the TPG Group, which comprises TPG Inc. with all its subsidiaries and affiliates. The TPG Group operates through multiple strategies, including buyout/control situations; growth & technology investing; and impact investing (including climate) across multiple sectors such as financial services, technology, consumer, travel, media, real estate and healthcare.

### *The Upswing Trust*

6. It has been submitted that Upswing Trust is jointly owned by subsidiaries of ADIA and TPG Inc. Upswing Trust acts through its trustee Upswing Trustee Company Limited (**Upswing Trustee**), a company incorporated under the laws of Jersey.

## **Transaction**

7. The Notice was given in relation to the combination envisaging acquisition of 5% shareholding of UPL SAS, subsequent to the internal reorganisation, by Platinum Trust and TPG Upswing through the Upswing Trust, acting through its trustee Upswing Trustee (**UPL SAS Acquisition**). As a condition precedent to the UPL SAS Acquisition, the UPL group proposed to undertake internal reorganisation of crop protection business (except manufacturing) and agri-tech/farm services business of UPL Limited (**UPL**), which *inter alia* involved the following steps:



- UPL SAS will become a direct<sup>1</sup> wholly owned subsidiary of UPL;
  - SWAL Corporation Limited (**SWAL**) and Nurture Agtech Private Limited (**Nurture**), presently wholly owned subsidiaries of UPL, will each become wholly owned subsidiaries of UPL SAS;
  - transfer of the crop protection business (except manufacturing) and the agri- tech/farm service business conducted by UPL (**Restructured Business**) to UPL SAS and Nurture.
8. Further, it was envisaged that Nurture will acquire Adarsh Farm Services business (**AFS Business**) from UPL.
9. UPL SAS, including all entities/businesses that will be housed under it, pursuant to the internal reorganisation, is hereinafter collectively referred to as the **Target Business**.
10. From the information available in the public domain,<sup>2</sup> it appears that the UPL SAS Acquisition has been consummated on or before 17<sup>th</sup> February 2023.

### **Notice under Green Channel and Issue of Show Cause Notice (SCN)**

#### *Statutory Obligations*

11. The Section 6(2) of the Competition Act, 2002 (**Act**) provides that any person or enterprise who or which proposes to enter into a combination shall give a notice to the Commission. Section 6(2A) of the Act provides that no combination shall come into effect until 210 days have passed from the day on which the notice has been given to the Commission under Section 6(2) of the Act or the Commission has passed orders under Section 31 of the Act, whichever is earlier.
12. The Notice was given under Section 6(2) of the Act read with Regulation 5A of the Combination Regulations, *i.e.*, the facility of Green Channel approval was availed by the notifying parties. Under Green Channel approval facility, *i.e.*, notice under Section 6(2) of the Act read with Regulation 5A of the Combination Regulations, a proposed combination is deemed to have been approved by the Commission under Section 31(1) of the Act upon filing of a notice under Regulation 5A(1) of the Combination Regulations and acknowledgement thereof.
13. Regulation 5A(1) of the Combination Regulations provides that for the category of combination mentioned in Schedule III of the Combination Regulations, the parties to

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<sup>1</sup> Previously indirect

<sup>2</sup> Disclosure dated 17<sup>th</sup> February 2023 made by UPL to BSE Limited



such combination may, at their option, give notice in Form I along with the declaration specified in Schedule IV (**Green Channel Declaration**). Schedule III of the Combination Regulations provides as follows:

*Considering all plausible alternative market definitions, the parties to the combination, their respective group entities and/or any entity in which they, directly or indirectly, hold shares and/or control: -*

*(a) do not produce/provide similar or identical or substitutable product(s) or service(s) (**Horizontal Overlap**);*

*(b) are not engaged in any activity relating to production, supply, distribution, storage, sale and service or trade in product(s) or provision of service(s) which are at different stage or level of production chain (**Vertical Interface**); and*

*(c) are not engaged in any activity relating to production, supply, distribution, storage, sale and service or trade in product(s) or provision of service(s) which are complementary to each other (**Complementarity**).*

[emphasis supplied]

14. The enterprise or person availing the Green Channel approval facility is required to furnish the Green Channel Declaration along with the notice. The contents of the Green Channel Declaration are reproduced as under:

*1. The notifying party confirms that it has furnished all the information and documents as required in Form I, as specified in Schedule II.*

*2. The notifying party confirms that the proposed combination falls under Schedule III and is not likely to cause adverse effect on competition.*

*3. The notifying party confirms that it has not made any statement which is false in any material particular or knowing it to be false; or omitted to state any material particular knowing it to be material.*



*The notifying party understands that if any of the above statements is found to be incorrect, the notice given and the approval granted, under regulation 5A, shall be void ab initio.*

*Signed by or on behalf of the notifying party*

*Signature(s)*

*Name (in block letters):*

*Designation:*

*Date: \_\_\_\_\_*

15. From the provisions of Regulation 5A(1) read with Schedule III of the Combination Regulations, it is observed that the parties to the combination can avail the benefit of the Green Channel approval facility only if the parties to the combination, their respective group entities and/or any entity in which they, directly or indirectly, hold shares and/or control neither exhibit Horizontal Overlap nor Vertical Interface nor Complementarity. Further, the person or enterprise giving notice to the Commission is required to furnish the Green Channel Declaration, *inter alia*, to the effect that the transaction satisfies the criteria prescribed for the Green Channel approval facility.

16. To avail the Green Channel approval facility, as required by Regulation 5A(1) of the Combination Regulations, the notifying parties in the instant matter along with the Notice, furnished the Green Channel Declaration, *inter alia*, declaring as follows:

*2. The notifying party confirms that the proposed combination falls under Schedule III and is not likely to cause adverse effect on competition.*

*3. The notifying party confirms that it has not made any statement which is false in any material particular or knowing it to be false; or omitted to state any material particular knowing it to be material.*

[emphasis supplies]

17. In the Notice, it was stated that:

*14. Based on the requirements for the Green Channel approval as provided in Regulation 5A and Schedule III of the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (Combination Regulations), the Parties confirm that to the best of their knowledge, there are:*



a. *No horizontal overlaps: Neither TPG (including the TPG Group) nor Platinum [i.e., Platinum Trust] (including ADIA and its affiliates (ADIA Group)) will be / are engaged in any business activity directly or indirectly<sup>5</sup> (through any investment) which is active in the same/similar/identical/substitutable business as that of Target Business in India post the Proposed Combination;*

b. *No vertical relationships: Neither TPG (including the TPG Group), nor Platinum (including the ADIA Group) will be / are engaged in any activity relating to the production, supply, distribution, storage, sale and service or trade in products or provision of services which are at different stages or levels of the production chain, as that of the Target Business, directly or indirectly,<sup>6</sup> post the Proposed Combination; and*

c. *No complementary relationships: Neither TPG (including the TPG Group) nor Platinum (including the ADIA Group) are engaged in any activity relating to the production, supply, distribution, storage, sale and service or trade in products or provision of services which are complementary to the activities of the Target Business in India post the Proposed Combination.*

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<sup>5</sup> a. *With respect to TPG, considering all entities in which the affiliates of the TPG Group has:*

- i. *direct or indirect shareholding of 10% or more; or*
- ii. *a right or ability to exercise any right (including any advantage of commercial nature with the portfolio company or its affiliates) that is not available to an ordinary shareholder;*  
*or*
- iii. *right or ability to nominate a director or observer (collectively, Materiality Threshold), and which have a direct/indirect business presence in India.*

b. *With respect to Platinum, all investee companies of ADIA Group that have a direct/indirect business presence in India and meet the Materiality Threshold.*

<sup>6</sup> *Ibid.*



[emphasis supplies]

18. In the Notice, in response to query 6.4 of Form I, it has been presented that parties to the combination and/or their respective group entities, directly or indirectly, do not produce/provide similar or identical or substitutable products or services, considering all plausible alternative(s).
19. Further, in the Notice, in response to query 6.5 of Form I, it has been presented that the parties to the combination and/or their respective group entities, directly or indirectly, are not engaged in any activity relating to the production, supply, distribution, storage, sale and service or trade in products or provision of services which is at different stages or levels of the production chain in which any other party to the combination is involved, considering all plausible alternative(s); and/or any complementary activities.
20. Along with the Notice, the notifying parties also furnished a declaration (**Notice Declaration**) as under:

*the notifying party declares and confirms that all information given in this Form [viz. Notice] and all pages annexed hereto are true, correct and complete to the best of its knowledge and belief, and that all estimates are identified as such and are its best estimates based on the underlying facts.*

[emphasis supplies]

21. From the Notice, the Commission *vide* its order dated 18<sup>th</sup> May 2023 (SCN), observed that the Upswing Trust holds 22.2% stake in UPL Corporation Ltd. (UPLC). Arysta LifeScience India Limited (Arysta India), a subsidiary of UPLC, is engaged in the business of manufacturing and distribution of formulated crop protection products (FCPPs), *inter alia*, to SWAL and UPL SAS. Arysta India also makes sales of FCPPs to third parties. Further, UPL SAS and SWAL are respectively engaged in the business of manufacturing and distribution, and marketing and sale of formulated crop protection products to third parties in India. Thus, activities of Arysta India on one hand, and UPL SAS and SWAL on the other, exhibit overlaps. Arysta India is an indirect subsidiary of the portfolio company<sup>3</sup> of the Upswing Trust. Thus, the activities of the Upswing Trust through UPLC and Arysta India appeared to exhibit overlaps with the activities of Target Business. Thereby, it appeared that the UPL SAS Acquisition does not fall under Schedule III, and the Green Channel Declaration appeared to be incorrect and false in material particular. Further, it appeared that notifying parties have made statements in the Notice, including Notice Declaration, that are false in material particular.

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<sup>3</sup> UPLC



22. The Commission further observed that the first proviso to Regulation 5A(2) of the Combination Regulations provides that where the Commission finds that the combination does not fall under Schedule III and/or the declaration filed pursuant to sub-regulation (1) is incorrect, the notice given and the approval granted under this regulation shall be *void ab initio* and the Commission shall deal with the combination in accordance with the provisions contained in the Act. Section 43A of the Act provides that if any person or enterprise fails to give notice to the Commission under Section 6(2) of the Act, the Commission shall impose on such person or enterprise a penalty which may extend to 1% of the total turnover or the assets, whichever is higher, of such a combination. Section 44 of the Act, *inter alia*, provides that if any person, being a party to a combination makes a statement which is false in any material particular, or knowing it to be false, such person shall be liable to a penalty which shall not be less than rupees fifty lakhs but which may extend to an amount prescribed therein.
23. In view of the above, the Commission *vide* the SCN dated 18<sup>th</sup> May 2023 directed Platinum Trust, acting through its trustee Platinum Trustee, and TPG Upswing to show cause in writing within 15 days of receipt of the notice as to why: (i) Notice should not be found *void ab initio* in term of first proviso to Regulation 5A(2) of the Combination Regulations and they should not be held in contravention of the provisions of Section 43A for not notifying UPL SAS Acquisition/consummating the UPL SAS Acquisition without the approval of the Commission; (ii) they should not be held in contravention of the provisions of Section 44 of the Act for making statements in the Notice, including Notice Declaration, and Green Channel Declaration which are false in material particular; and (iii) they should not be directed, under Regulation 8(1) [to be actually read as 8(2)] of the Combination Regulations, to furnish a notice in relation to the UPL SAS Acquisition. Further, the Commission allowed Platinum Trust, acting through its trustee Platinum Trustee, and TPG Upswing, to make their submissions on the quantum of penalty which may be levied by the Commission in the event they are to be held in contravention of the provisions of the Section 43A and/or 44 of the Act.
24. The SCN was communicated to Platinum Trust, acting through its trustee Platinum Trustee, and TPG Upswing *vide* communication dated 24<sup>th</sup> May 2023. After seeking extension of time, Platinum Trust, acting through its trustee Platinum Trustee, and TPG Upswing *vide* submission dated 29<sup>th</sup> June 2023 furnished their response to the SCN (**Response to SCN**) and sought a hearing before the Commission.
25. The Commission, on 24<sup>th</sup> July 2023, heard the Acquirers at length. The Acquirers completed their submissions. Further, the Acquirers undertook to furnish complete details as per query 6 of the Form I, within 10 days from the date of hearing. Thereupon, the Acquirers furnished their written submissions dated 3<sup>rd</sup> August 2023, followed by submissions dated 8<sup>th</sup> August 2023 (collectively, the **Written Submissions**).





### **Submissions of the Acquirers**

26. The contentions of the Acquirers are summarised as follows:
- 26.1 Arysta India and UPL SAS/SWAL belong to the same corporate group, *i.e.*, UPL Group. Arysta India and UPL SAS/SWAL are essentially two arms of the same group selling the same products. There is no need to map overlaps between two entities that belong to the same group;
- 26.2 The FCPPs sold by Arysta India to UPL SAS/ SWAL are in the nature of intra-group (captive) sales, therefore there is no change in the competitive landscape of the market of FCPPs on account of the instant transaction;
- 26.3 UPL SAS/SWAL and Arysta India are treated as the same brand/entity both internally within the companies and externally by the third parties. The Commission in the *Godrej case*<sup>4</sup> clarifies that in determining whether two entities are competitors (or not), significant reliance must be placed on consumer perception, *i.e.*, whether the end consumers of such products and services perceived the two entities/brands as competitors or not;
- 26.4 Arysta India's miniscule sales for FCPPs in the market to third parties is not its primary business. It only undertakes such third-party sales because of certain regulatory reason or surplus capacity. Arysta India does not even have an independent distribution network or marketing team of its own in India and instead relies on UPL SAS's distributors. Arysta India is in the process of ceasing its FCCPs sales to third parties. The decision to discontinue third party sales by Arysta India had been taken independently on account of purely commercial reasons, much before the transaction was completed. In furtherance of such a decision in 2019, Arysta India's employees that are responsible for sales and marketing of FCPPs in India were intended to be reduced, and at the time of filing the Notice, Arysta India's sales and marketing department which is responsible for overseeing the sales in India, had number of employees just in single digit. By 31<sup>st</sup> December 2023: (a) Arysta India will not have any employees who will be responsible for sales of FCPPs to third-parties in India; and (b) Arysta India will not have a marketing or sales team for its India business. Third-party sales have diminished over the course of FY 2019-20 to FY 2022-23. Arysta India generated 1.5% and 0.8% of its total revenue from the third-party sales for FY 2022-23 and for FY 2023-24 (April and May) respectively. Cessation of Arysta India's sales to third parties renders any overlap concerns academic. In the transactions filed under the regular route, the Commission has not mapped overlaps between the businesses that are discontinued

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<sup>4</sup> Suo Moto Case No. 03 of 2017



since it eliminated any overlap and consequently any market impact of that overlap. For instance, in one of the most recent transactions, *Dalmia Cement*<sup>5</sup>, the Commission accounted for the fact that after the consummation of the transaction, the acquirer would cease to provide refractory services to cement manufacturers in India due to which the potential vertical relationship between the acquirer group and the target will no longer exist and accordingly approved the transaction without conducting an overlap assessment on this aspect (also see *Aircel*<sup>6</sup>, *ABFPL/KAPL*<sup>7</sup>, *HCJI Holdings*<sup>8</sup>). Similarly, here, *Arysta India* is going to stop its FCCPs sales to third parties in due course; and

26.5 The Commission, in its decisional practice, has been liberal while examining transactions under the green channel mechanism. The Commission has approved combinations under the green channel mechanism even though the transaction exhibited certain minor horizontal/vertical overlaps because these transactions have no impact on the market. Green channel mechanism is a beneficial provision and it is a settled law that a beneficial provision/exemption must be liberally interpreted. The Hon'ble Supreme Court of India recognised the importance of economic analysis in judicial decisions and while introducing policies in *Shivashakti Sugars Ltd vs Shree Renuka Sugar Ltd. & Ors.*<sup>9</sup> and held that, “*However, on the application of law and while interpreting a particular provision, economic impact/effect of a decision, wherever warranted, has to be kept in mind. ...Likewise, in a situation where two views are possible or wherever there is a discretion given to the Court by law, the Court needs to lean in favour of a particular view which subserves the economic interest of the nation.*”.

### **Findings of the Commission**

27. The Commission has considered the written and oral submissions of the Acquirers. A notice under 6(2) of the Act can be submitted by the notifying party(ies) for the Green Channel approval facility, only if criteria prescribed under Schedule III of the Combination Regulations are satisfied. Criteria prescribed under Schedule III of the Combination Relations are objective and specific *viz.* no overlap [no Horizontal Overlap, Vertical Interface and Complementarity]. To determine whether a particular combination is eligible to avail the benefit of Green Channel, the pertinent question that should be asked is *do the parties to the transaction, their respective group entities and/or any entity in which they, directly or indirectly, hold shares and/or control, exhibit Horizontal Overlap, Vertical Interface or Complementarity, considering all plausible alternative*

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<sup>5</sup> Combination Registration No.C-2022/12/993

<sup>6</sup> Combination Registration No. C-2020/08/76

<sup>7</sup> Combination Registration No. C-2013/11/139

<sup>8</sup> Combination Registration No. C-2022/03/916

<sup>9</sup> Civil Appeal No. 5040 of 2014



*market definitions*. If answer to the question is yes, then the transaction cannot avail benefit of the Green Channel approval facility.

28. In the instant matter, the primary issue for determination is whether the UPL SAS Acquisition is eligible for Green Channel approval facility or not. The issue requires its determination based on criteria prescribed under Schedule III of the Combination Regulations and facts of the instant case. So far as the eligibility of a combination for Green Channel approval facility is concerned, facts or opinions such as the overlapping entities belonging to the same group; the transaction not resulting in change in competition landscape; no likely effect of a combination; perception about overlapping entities/products being considered as the same; and sales to third parties not being significant and declining *etc.* are inconsequential. These factors may, at most, warrant their consideration in detailed assessment of likely effect of a combination on competition based on the facts of the case but not in determination of eligibility for Green Channel approval facility.
29. The Acquirers have also argued that Arysta India is in the process of ceasing its FCCPs sales to third parties. Further, cessation of Arysta India's sales to third parties renders any overlap concerns academic. Acquirers have also submitted that even in the transactions filed under normal route, the Commission has not mapped overlaps between the businesses that are discontinued since it eliminated any overlap and consequently any market impact of that overlap. In this regard, the Commission observes that the cases cited by the Acquirers are the cases where notices to the Commission were given under ordinary route [*i.e.*, not under Green Channel] under which the Commission undertakes a detailed assessment of likely effect of the combination on competition in India. In these cases, the commission factored case specific facts in holistic assessment of likely effect of the combination on competition. Under the Green Channel approval facility, a proposed combination is deemed to have been approved by the Commission under sub-section (1) of section 31 of the Act, upon filing of a notice under regulation 5A(1) of the Combination Regulations and acknowledgement thereof. The Green Channel approval facility does not envisage detailed assessment of likely effect of a combination on competition in India that is otherwise undertaken for all other combinations. If any overlap exists between the parties to the combination, their respective group entities and/or any entity in which they, directly or indirectly, hold shares and/or control, then case requires detailed assessment of likely effect of the combination on competition in India and accordingly is not eligible for benefit of the Green Channel approval facility. A combination does not become eligible for the benefit of Green Channel approval facility merely on the ground of probable/potential/under progress cessation of overlap. These factors may, at most, warrant their consideration in detailed assessment of likely effect of a combination on competition based on the facts of the case.



30. With regard to the claim of the Acquirers that notices for certain other combinations with certain minor horizontal/vertical overlaps have given under Green Channel approval facility, the Commission observes that in the instant matter, primary issue for determination is whether the UPL SAS Acquisition is eligible for the benefit of Green Channel approval facility. The issue needs its determination based on the facts of the instant matter. In deference of the judgment<sup>10</sup> of Hon'ble Supreme Court cited by the Acquirers, the Commission observes that the eligibility criteria for Green Channel approval facility are objective and specific *viz.* no overlap between the parties to the combination, their respective group entities and/or any entity in which they, directly or indirectly, hold shares and/or control.
31. The Commission observes that Arysta India, a subsidiary of UPLC, is engaged in the business of *manufacturing and distribution* of formulated crop protection products (FCPPs), *inter alia*, to SWAL and UPL SAS. Arysta India also makes sales of FCPPs to third parties. Further, UPL SAS and SWAL are respectively engaged in the business of *manufacturing and distribution*, and *marketing and sale* of formulated crop protection products (FCPPs) to third parties in India. Thus, activities of Arysta India on one hand, and UPL SAS and SWAL on the other exhibit overlaps. Arysta India is an indirect subsidiary of the portfolio company<sup>11</sup> of the Upswing Trust. Thus, the activities of the Upswing Trust through UPLC and Arysta India appeared to exhibit overlaps with the activities of Target Business. Thereby, the Commission finds that the UPL SAS Acquisition does not satisfy the conditions prescribed under Schedule III of the Combination Regulations. Therefore, the UPL SAS Acquisition is not eligible for the benefit of Green Channel approval facility and the Green Channel Declaration was incorrect and false in material particulars. Further, the notifying parties made statements in the Notice, including Notice Declaration which are false in material particulars.
32. The first proviso to Regulations 5A(2) of the Combination Regulations provides that where the Commission finds that the combination does not fall under Schedule III and/or the declaration filed pursuant to sub-regulation (1) is incorrect, the notice given and the approval granted under this regulation shall be *void ab initio* and the Commission shall deal with the combination in accordance with the provisions contained in the Act. Accordingly, the Notice and deemed approval, under Section 31(1) of the Act read with Regulation 5A of the Combination Regulations, for UPL SAS Acquisition is found to be *void ab initio*. As the UPL SAS Acquisition has already been consummated, the Acquirers are liable for penalty under Section 43A of the Act.

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<sup>10</sup> Civil Appeal No. 5040 of 2014, *Shivashakti Sugars Ltd vs Shree Renuka Sugar Ltd. & Ors.*

<sup>11</sup> UPLC



33. The Commission further observes that as the Acquirers made statements in the Notice, including Notice Declaration, and Green Channel Declaration which are false in material particulars, the Acquirers are liable for penalty under Section 44 of the Act.
34. With regard to levy of penalty, the Acquirers have mainly submitted that they notified the transaction and consummated the same based on the legitimate expectation and a *bona fide* belief that the transaction qualified for a green channel notification. It has been further submitted that the Notice was guided by: (a) decisional practices; (b) Arysta India primarily undertakes only captive sales; (c) UPL SAS and Arysta India are not competing entities; and (d) gradual cessation of sales of FCCPs by Arysta India to third parties. The Acquirers had no intention to not file the transaction or to conceal anything. The Acquirers provided all facts and information on a *bona fide* belief that the transaction qualified for green channel. It has also been pointed out that the Commission has, in the past, imposed penalties under Section 44 of the Competition Act only when the parties had provided incomplete and false information to the Commission. It has been further submitted that given Arysta India's insignificant third-party sales, the overlap is negligible and the market facing information of the third-party sales was not material since it would have no effect on the competition in any relevant market.
35. The Commission has perused the submissions of the Acquirers and the material on record. At the outset, it is observed that Section 43A of the Act empowers the Commission to impose a penalty which may extend to 1% of the total turnover or the assets, whichever is higher, of such a combination. Further, Section 44 of the Act empowers the Commission to determine the appropriate amount of penalty in a matter, not less than INR fifty lakh, if any person, being a party to a combination *inter alia* makes a statement which is false in any material particular, or knowing it to be false.
36. Considering the facts and circumstances of the case, the Commission considers it appropriate to impose a penalty of Rs. 5,00,000 (INR Five Lakh) under Section 43A of the Act, and of INR 50,00,000 (INR Fifty Lakh) under Section 44 of the Act, on the Acquirers. The Acquirers shall be jointly and severally liable to pay the amount of penalty.
37. The Acquirers shall pay total penalty of INR 55,00,000 (*i.e.* INR 5,00,000 under Section 43A of the Act *plus* INR 50,00,000 under Section 44 of the Act) within 60 days from the date of receipt of this order.
38. The Commission, at this stage deems it appropriate to highlight that Green Channel dispensation providing for deemed approval of certain categories of combinations, was conceived and designed to facilitate faster clearance of the combinations which had no Horizontal Overlap, Vertical Interface or Complementarity, as specified under Schedule III of the Combination Regulations. The criteria for the Green Channel facility are specific and objective. Under Green Channel, a combination is deemed to have been approved



under Section 31(1) of the Act upon filing of a notice under Section 6(2) of the Act and acknowledgement thereof, and does not envisage assessment of likely effect of the Combination by the Commission. By its very nature, the Green Channel approval facility is a trust-based mechanism based on self-assessment and correct declaration. Thus, it is incumbent upon the person choosing to avail the Green Channel approval facility to observe *uberrima fides* (utmost good faith) in availing the same and should subject only the eligible combinations for this Channel. Subjecting ineligible combinations for the Green Channel approval facility would erode and strike at the very basis of this trust based regulatory mechanism and undermine the sanctity of its framework.

39. However, it is made clear that the penalty imposed by the Commission upon the Acquirers has been determined in the background and totality of the present case. Going forward, any disregard to the conditions for availing Green Channel would be dealt with seriously with attendant consequences in accordance with law based on the specificities of the case.
40. Now, the Commission proceeds to deal with other submissions advanced by Acquirers. The Acquirers have submitted that they should not be directed to give notice under Regulation 8(2) of the Combination Regulations.
41. From the details furnished by the Acquirers *vide* the Written Submissions, activities of Arysta India and UPL SAS/SWAL exhibit overlaps in relation to:
  - Adjuvants [POLY-MODI811.6EC];
  - Fungicides - for apple, cherry, grapes, tomato and potato (for scab, brownrot, downy, early and late blight) [CAPTAN500WP];
  - Fungicide for wheat, soybean, cotton, groundnut, pigeon pea, potato (for loosemut) [CARBOXIN200+THIRAM200FS + CARBOXIN375+THIRAM375WS]: (i) for wheat (for loosemut), and (ii) wheat, soybean, cotton, groundnut, pigeon pea, potato (for loosemut, collar rot, seed rot, stem rot, fusarium wilt);
  - Insecticides to control termites [CHLORPYRI200EC];
  - Insecticides for vector control (mosquitoes/ housefly) [DIFLUBENZ250WP];
  - Bio-Stimulants or all crops (plant growth promoters) [ASCOP-CMS1029SL, FOLCISTE13.78+MICRO-NTR0.999+PRMNT-NPK80.5+SNT-CaMgS0.128SL, and CORNSTPLQ80+FOLCISTE11.75+GAEM-SIMP742+HYD-CORN63SL];
  - Bio-Stimulants for Mango, Pineapple, Coffee, Tomato and Rubber (plant growth regulators) [ETHEPHON390SL].
42. From the Written Submissions, the Commission observes that market shares of Arysta India and UPL SAS/SWAL in relation to the aforesaid activities are not significant enough to raise a competition concern.



43. It has also been submitted that both Arysta India and UPL SAS made some B2B sales of certain FCPPs. For Arysta India, B2B sale is an *ad hoc* business and there are no long-term contracts with any B2B customer. In FY 2021-22, both Arysta India and UPL SAS made sales of herbicide Glufosinate. In this regard, based on the information furnished in the Written Submissions, the Commission observes that the market share of UPL SAS and Arysta India are not significant to raise any competition concern.
44. Considering the materials available on record, the Commission is of the opinion that the UPL SAS Acquisition is not likely to have any appreciable adverse effect on competition in India, and therefore, the Commission hereby approves the UPL SAS Acquisition under Section 31(1) of the Act.
45. It is made clear that nothing contained in this order shall be deemed to be confidential, as the same has been used for the purposes of the Act in terms of the provisions contained in Section 57 of the Act.
46. The Secretary is directed to communicate this order to the Acquirers.