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Fair Competition
For Greater Good

COMPETITION COMMISSION OF INDIA

(Combination Registration No.C-2015/08/298)

02.02.2017

Order under Section 43A of the Competition Act, 2002 ("Act") in relation to the inquiry initiated under sub-section (1) of Section 20 of the Act against Reydel Automotive Holdings B.V.

Background

1. The Competition Commission of India ("**Commission**") in its meeting held on 05.03.2015, took *suo motu* cognisance of the acquisition by Cerberus Capital Management LP ("**Cerberus**") of Visteon Interiors System India Private Limited ("**VISI**") and the automotive interiors business of Visteon Automotive Systems India Private Limited ("**VASI**"). The transaction came to the notice of the Commission during the assessment of Combination Case bearing Registration No. C -2015/01/242 filed by Hahn & Co. Auto Holdings Co., Ltd. and Hankook Tire Co., Ltd. The Commission observed that the above said acquisition by Cerebrus was not notified under sub-section (2) of Section 6 of the Act. Accordingly, a communication dated 16.03.2015 was issued to Cerberus under sub-section (1) of Section 20 of the Act. The response(s) to said communication was filed by Reydel Automotive Holdings B.V. ("**Acquirer**" or "**Reydel**", earlier known as Promontoria Holding 103 B.V.), a company wholly controlled by Cerberus, on 15.04.2015 and 18.05.2015 (subsequently revised on 27.05.2015).

2. It is noted that before the Commission could direct the Acquirer to file notice, in accordance with erstwhile sub-regulation (2) of Regulation 8 of the Competition Commission of India (Procedure in regard to transaction of business relating to combinations) Regulations, 2011 ("**Combination Regulations**"), the Acquirer filed a notice in Form I with the Commission on 25.05.2015, which was assigned Combination Registration No. C-2015/05/280.

3. The Commission, in its meeting held on 19.06.2015, noted that Cerberus had acquired global automotive interior business of Visteon Corporation ("**Visteon**"), pursuant to the

execution of an Amended and Restated Master Purchase Agreement ("**MPA**") dated 01.05.2014 (subsequently amended on 03.07.2014 and 31.10.2014) entered amongst the Acquirer, Visteon and VIHI LLC, a wholly-owned indirect subsidiary of Visteon. In India, the combination comprised of two inter-connected sequential steps, *viz.*: (a) demerger of the automotive interiors business of VASI into VISI, pursuant to a scheme of demerger dated 17.09.2014; and (b) acquisition of the entire share capital of VISI by the Acquirer from Halla Visteon Climate Control Corporation ("**HVCC**"), pursuant to a Share Purchase Agreement executed on 28.11.2014 amongst HVCC and two wholly owned subsidiaries of the Acquirer, *viz.*, Reydel Automotive Minority Holdings B.V. and Reydel Automotive B.V. As per the information given by the Acquirer, at the time of demerger, both VASI and VISI were subsidiaries of HVCC, which itself was a subsidiary of Visteon. The Commission noted that as a result of the combination, Reydel acquired VISI and VASI continued to exist as a subsidiary of Visteon.

4. The Commission also took note of the arguments of the Acquirer that the assets and turnover thresholds prescribed under Section 5 of the Act were not met in respect of the above transaction, as the combined value of assets of VISI along with the assets of the demerged automotive interior business of VASI to VISI, were below the *de minimis* thresholds set out in the Government of India Notification No. S.O. 482(E) dated 04.03.2011 ("**Target Exemption**"). However, the Commission noted that for the purpose of analysis of the value of the target's assets and turnover, as set out in sub-regulation (9) of Regulation 5 of the Combination Regulations, the assets of the transferor enterprise (i.e., VASI) would be attributed to VISI (the enterprise to which the assets are being transferred). As a result, the value of assets and turnover of VISI (after attribution) exceeded the value of asset and turnover thresholds of INR 250 crore and INR 750 crore in India, respectively, as provided in the Target Exemption. The Commission further noted that the assets of Cerberus (at group-level), met the thresholds prescribed under Section 5(a) (ii) of the Act and therefore the acquisition of automotive interior business of Visteon by Cerberus constitute a 'combination'.

5. The Commission also observed that once a *suo moto* inquiry under sub-section (1) of Section 20 of the Act has been initiated, the Acquirer does not have the discretion to file

a notice in Form I. Erstwhile sub-regulation (2) of Regulation 8 of the Combination Regulations read as under:

"*…(2) Where the Commission decides to commence an inquiry, referred to in sub-regulation (1), the Commission, without prejudice to any penalty which may be imposed or any prosecution which may be initiated under this Act, shall direct the Parties to the combination to file notice in Form II, as specified in Schedule II to these regulations, duly filled in, verified and accompanied by evidence of requisite fee.…*"

Thus, in *suo moto* combination matters, initiated under sub-section (1) of Section 20 of the Act, a Form II notification must be made pursuant to the direction of the Commission on the same. Accordingly, the notice dated 25.05.2015 filed by the Acquirer in Form I was held to be not in conformity with the provisions of the Act read with the Combination Regulations and therefore, not valid in terms of Regulation 14 of the Combination Regulations.

6. *Vide* letter dated 03.07.2015, the Acquirer was directed to file a fresh notice for the combination in Form II in terms of sub-regulation (2) of Regulation 8 of the Combination Regulations, within 30 (thirty) days from the date of receipt of the direction in this regard.

7. In accordance with the directions of the Commission, the Acquirer filed the notice for the combination in Form II with the Commission on 03.08.2015. The Commission, in its meeting held on 25.05.2016, considered the combination and approved the same under sub-section (1) of Section 31 of the Act. The said decision was taken without prejudice to any penalty which may be imposed or any prosecution which may be initiated against the Acquirer in accordance with the provisions of the Act.

Proceedings under Section 43A of the Act

8. In accordance with sub-section (2) of Section 6 of the Act, the said acquisition, being a 'combination', ought to have been notified to the Commission within thirty days of execution of MPA dated 01.05.2014, *i.e.* by 31.05.2014. Further, it was noted from the submissions of the Acquirer that the combination was already given effect to, on 01.12.2014, without observing the statutory waiting period under sub-section 2A of

Section 6 of the Act *i.e*. earlier of two hundred and ten (210) days from the day on which notice is given to the Commission under sub-section (2) of Section 6 or the Commission has passed order under Section 31 of the Act.

9. In view of the foregoing, it *prima facie* appeared that the Acquirer not only failed to give the notice of the combination within the time period stipulated under sub-section (2) of Section 6 but also gave effect to the combination in contravention of sub-section (2A) of Section 6 of the Act. As a result, in its meeting held on 20.10.2015, the Commission, decided to initiate proceedings against the Acquirer under Section 43A of the Act. Accordingly, a show cause notice dated 04.12.2015 was issued to the Acquirer under Section 43A of the Act read with Regulation 48 of the Competition Commission of India (General) Regulations, 2009 ("**General Regulations**"), to explain, in writing, within 15 days of the receipt of such communication, as to why penalty, in terms of Section 43A of the Act, should not be imposed on the Acquirer for failure to file a notice in respect of the combination under sub-section (2) of Section 6 read with sub-section 2A of Section 2 of the Act ("**SCN**"). The Acquirer filed its response to the SCN with the Commission on 22.01.2016 ("**Response to SCN**"), after seeking extension of time.

10. The Commission, in its meeting held on 25.05.2016, considered the Response to SCN and decided to grant a personal hearing to the Acquirer, as requested. The authorized representative of the Acquirer was heard on 19.07.2016. The Commission noted that, *vide* its written and oral submissions, the Acquirer made, *inter alia*, the following submissions:

10.1 That at the time of signing the documents for the acquisition, Reydel was under a *bona fide* belief that the transaction did not amount to a "combination", and consequently was not required to be notified to the Commission. This belief was based, *inter alia*, on the understanding that: (a) the target enterprise, i.e., VISI, did not exceed the thresholds set out in Target Exemption and hence, the transaction benefitted from the Target Exemption; and (b) the transaction did not exceed the jurisdictional thresholds prescribed under Section 5 of the Act.

10.2 That in relation to the Target Exemption, the target in India, *viz.* VISI, had assets worth approximately INR 5 lakhs and no turnover as on 31 March 2014.

Furthermore, even on applying the rule of attribution, the approximate value of the assets contributed by the de-merged business of VASI in India and its estimated turnover in India were below the threshold(s) provided in the Target Exemption.

10.3 That on the basis of international jurisprudence, it was understood that only the assets and turnover of Visteon's automotive interiors business in India, i.e., the de-merged business of VASI which was being acquired, would be considered for the purposes of assessing thresholds.

10.4 That on the basis of the understanding that only the acquired business would be considered as the target for the purpose of assessing thresholds under the Act, it was observed that the combined assets and turnover of the Acquirer and the business being acquired did not exceed the enterprise-level thresholds prescribed under Sections 5(a)(i)(A) and 5(a)(i)(B) of the Act, either in India or worldwide. Further, even on attribution of all the assets and turnover of VASI to VISI, the combined assets and turnover of the Acquirer and Target did not exceed the enterprise-level thresholds prescribed under Section 5(a)(i)(A) and 5(a)(i)(B) of the Act in India and worldwide.

10.5 That when the acquired business is considered to belong to the Cerberus Group entirely, the group-level thresholds prescribed in Sections 5(a)(ii)(A) and 5(a)(ii)(B) of the Act in India and worldwide are not exceeded. Section 5(a)(ii) of the Act states that the group to which the enterprise whose control, shares, assets or voting rights have been acquired or are being acquired, would belong to after the acquisition, jointly have or would jointly have the specified assets and turnover. Therefore, this requires consideration of only those assets and turnover which the acquirer group and the target business being acquired would jointly be the owner of. In the present case, the worldwide assets and turnover of the Cerberus Group, along with those of VISI (including only those assets and turnover attributable to the business of VASI which was de-merged to VISI), did not meet the thresholds under Sections 5(a)(ii)(A) or 5(a)(ii)(B) of the Act.

10.6 That post consummation of the transaction, the relevant group to which the Target would belong could be interpreted to include the Cerberus fund controlling the

Reydel investment and portfolio companies controlled by such fund, and not all Cerberus funds and controlled portfolio companies, taken as a whole. Accordingly, the group thresholds under Section 5(a)(ii) of the Act, by including only the Cerberus fund and not the entire Cerberus group, would not have been exceeded even if the entire assets and turnover of VASI were attributed to the Target.

10.7 That if Reydel is found to be in violation of the relevant provisions of the Act, there are a number of mitigating circumstances in the present case, which are as follows:

10.7.1 Reydel has demonstrated its intention to fully comply with all laws of the countries in which it operates, to which India is no exception;

10.7.2 Reydel has been transparent throughout the review of the acquisition by the Commission and there has been no concealment of any related information/facts;

10.7.3 The combination did not result in the creation of any horizontal overlaps or any vertical relationships, and merely resulted in a change in control of an existing business and there was no basis for Reydel to attempt to intentionally avoid a filing in India;

10.7.4 Reydel and Visteon each engaged reputable law firms in India in relation to various corporate and regulatory aspects of the transaction. Reydel believed in good faith that the transaction was exempt from notification under the Indian competition laws and was not advised to the contrary by its legal advisors at the time despite its best efforts to ensure compliance with the overall regulatory regime.

11. With respect to the above submissions of the Acquirer, the Commission observed as under:

11.1 The present combination, in India, involved two steps: (a) demerger of the automotive interiors business of VASI into VISI; and (b) subsequent acquisition of

100% shareholding of VISI by the Acquirer. In this regard, sub-regulation (9) of Regulation 5 of the Combination Regulations reads as under:

"*Where, in a series of steps or individual transactions that are related to each other, assets are being transferred to an enterprise for the purpose of such enterprise entering into an agreement relating to an acquisition or merger or amalgamation with another person or enterprise, for the purpose of section 5 of the Act, the value of assets and turnover of the enterprise whose assets are being transferred shall also be attributed to the value of assets and turnover of the enterprise to which the assets are being transferred.*"

11.2 In the instant case, the de-merger of the automotive interiors business of VASI with and into VISI, was for the purposes of and an integral step of the global acquisition of Visteon's automotive interiors business by the Cerberus Group. Accordingly, for the purpose of determination of value of the assets and turnover of VISI, the assets of the transferor enterprise *i.e.* VASI would be attributed to VISI (the enterprise to which the assets are being transferred) in terms of sub-regulation (9) of Regulation 5 of the Combination Regulations. Thus, once the total value of assets and turnover of VASI are attributed to VISI, the assets and turnover of VISI exceed the *de minimis* asset and turnover thresholds set out in the Target Exemption and the transaction fails to qualify for Target Exemption.

11.3 In relation to the argument of the Acquirer that the value of assets and turnover of the demerged business of VASI is less than the value of assets and turnover prescribed by Target Exemption, the Commission noted that in a previous case[1], it has observed that the Target Exemption is applied to an enterprise and that the business divisions and/or units do not qualify as an "enterprise". As a result, the assets and turnover of VISI (on account of attribution of entire assets and turnover of VASI) exceed the value of asset and turnover as prescribed under the Target Exemption.

[1]Order under Section 43A of the Act in combination bearing registration no. C-2015/07/289 (*Eli Lilly/Novartis*).

11.4 In relation to the Acquirer's arguments on inconsistency between the Indian law and international jurisprudence, it is noted that the Target Exemption sets out in clear terms that the thresholds contained therein shall apply to the enterprise, whose assets, control, shares, voting rights or assets are being acquired and not to any business division or unit or assets being acquired.

11.5 In relation to satisfaction of group-level thresholds under Section 5 of the Act, it is noted that the European Commission's Order approving this transaction (Case No. COMP/ M.7285 - *Cerberus/ Visteon Interiors*) [2] states that "*the European Commission received notification of a proposed concentration pursuant to Article 4 of the Merger Regulation by which the Cerberus Group ("Cerberus", USA), via its wholly controlled company Promontoria Holding 103 B.V. ("PH 103"), acquires within the meaning of Article 3(1)(b) of the Merger Regulation sole control of the automotive interior products business of Visteon Corporation ("Visteon Interiors", USA) by way of purchase of assets and stocks*". Further, the description of the concentration[3] as submitted by Cerebrusthe Acquirer to the European Commission (and published on the website of the European Commission) states "*the notified transaction relates to the acquisition by PH 103* [i.e., the Acquirer] *of the interior products business of Visteon Corporation. PH 103 is part of the Cerberus Group*". Thus, as per the submissions of the Acquirer itself made before the European Commission, Reydel (*i.e*. the Acquirer, earlier known as Promontoria Holding 103 B.V.) is a part of the Cerberus Group. Further, as per information provided by the Acquirer, the Cerberus Group along with VISI (after attribution of entire assets and turnover of VASI) jointly meet the group-level thresholds set out in Section 5(a)(ii) of the Act. Accordingly, the acquisition of automotive interiors business of Visteon by the Acquirer is a combination under Section 5(a)(ii) of the Act. Thus, the Acquirer ought to have filed the notice for the combination within thirty days of execution of the MPA dated 01.05.2014 *i.e.* by 31.05.2014.

[2]As available on the website of the European Commission at:
http://ec.europa.eu/competition/mergers/cases/decisions/m7285_20140801_20310_3800787_EN.pdf

[3]As available on the website of the European Commission at:
http://ec.europa.eu/competition/mergers/cases/additional_data/m7285_34_3.pdf

12. 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" (emphasis added)

13. 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"

14. Thus, 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. 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.

15. In the instant case, it is observed that the Acquirer not only failed to give a notice of the combination to the Commission within thirty days of execution of the MPA dated 01.05.2014, but also gave effect to the combination before the Commission could assess the appreciable adverse effect on competition, in violation of sub-section (2) and sub-section (2A) of Section 6 of the Act.

16. In relation to the contention of the Acquirer that it did not conceal the acquisition from the Commission, it is noted that, in the instant case, the Commission took *suo motu* cognisance of the combination and initiated an inquiry under sub-section (1) of Section 20 of the Act and that the Acquirer filed a notice with the Commission only after receipt of letter from the Commission inquiring into the combination. In the absence of the

Commission's *suo motu* inquiry into the combination, the combination would have escaped the scrutiny of the Commission's assessment of whether the combination has caused or is likely to cause an appreciable adverse effect on competition in India.

17. It is further noted that the Hon'ble Supreme Court has held in *The Chairman, SEBI v Shriram Mutual Fund and Anr.*, that "*…the penalty is attracted as soon as contravention of the statutory obligations as contemplated by the Act is established and, therefore, the intention of the parties committing such violation becomes immaterial. In other words, the breach of a civil obligation which attracts penalty under the provisions of an Act would immediately attract the levy of penalty irrespective of the fact whether the contravention was made by the defaulter with any guilty intention or not…".*

18. In view of the foregoing, it emerges that the Acquirer has failed to give notice to the Commission in accordance with the provision of sub-section (2) of Section 6 and has also given effect to the combination, in contravention of sub-section (2A) 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*"

19. The Commission can levy a penalty which may extend up to one percent of the total turnover or the assets of the combination, whichever is higher, under Section 43A of the Act. However, the Commission has sufficient discretion to consider the conduct of the parties and the circumstances of the case to arrive at an appropriate amount of penalty. Accordingly, the Commission has considered the totality of factors, while determining the quantum of penalty. In view of the foregoing, applying the principles of proportionality, the Commission considered it appropriate to impose a penalty of INR 25,00,000/- (INR twenty-five lakhs only) on the Acquirer.

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

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