05.12.2016

Notice given under Section 6(2) of the Competition Act, 2002 ("Act") by Public Sector Pension Investment Board and Grupo Isolux Corsan: Combination Regn. No. C-2015/10/330

Order under Section 43A of the Act

1. On 20.10.2015, the Competition Commission of India (hereinafter referred to as the **"Commission"**) received a notice, under Section 6(2) of the Act filed jointly by Public Sector Pension Investment Board ("**PSP**") and Grupo Isolux Corsan ("**GIC**") (collectively "**Parties**").

2. The transaction related to dissolution of Isolux Infrastructure Netherlands, B. V. ("**IIN**"), a joint venture between PSP and GIC. Pursuant to the transaction, GIC, through its subsidiary Grupo Isolux Corsán Concesiones, S.A., was envisaged to become the sole owner of the energy business (electric transmission and solar photovoltaic assets) with the exception of the transmission line in the US ("**Energy Business**") and PSP, through its subsidiary PSPEUR S.à.r.l, was envisaged to become the sole owner of the road business (including the transmission line in the US) ("**Road Concessions Business**") ("**Combination**").

3. For the purpose of the Combination, the Parties executed a Settlement Agreement ("**SA**") on 31.03.2015. The Parties stated that the SA was an interim agreement and was subject to finalisation after expert determination of certain issues such as equity split, valuations and legal steps required to effect the dissolution of joint venture. It was stated that following the expert determination of the above, the SA was finalised on 24.09.2015. Accordingly, the Parties submitted that for the purpose of Section 6(2) of the Act, the SA, the Agreed Structure (as defined in SA) and the email acceptances of the Agreed Structure as communicated on 24.09.2015 together constitute the binding agreement and trigger the filing obligation in respect of the Combination with the Commission.

4. On 03.12.2015, the Commission considered and assessed the Combination and approved the same under Section 31(1) of the Act.

Proceedings under Section 43A of the Act

5. In terms of Section 6(2) of the Act, an enterprise, which proposes to enter into a combination, is required to give a notice to the Commission, disclosing the details of the proposed combination, within thirty days of execution of any agreement or other document for acquisition. Further, as per Section 6(2A) of the Act, 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) or the Commission has passed orders under Section 31 of the Act, whichever is earlier.

6. The Commission, at the time of approval of the Combination, observed that based on information furnished by the Parties in the notice filed by them, the SA appears to be a binding agreement and that the execution of the SA triggered the filing requirement regarding the Combination and therefore the notice should have been filed within 30 days of the execution of the SA, i.e., by 30.04.2015. However, the Parties had filed the notice on 20.10.2015 after the acceptance of the Agreed Structure. Since it appeared that the Parties failed to give notice to the Commission within the time stipulated under the provisions of the Act, a show cause notice was issued on 08.01.2016 ("**SCN**") to the Parties under Section 43A of the Act read with Regulation 48 of the Competition Commission of India (General) Regulations, 2009 ("**General Regulations**"). The SCN required the Parties to show cause, in writing, within 15 days of receipt of the notice, as to why penalty, in terms of Section 43A of the Act, should not be imposed upon them for failure to file notice for the Combination in accordance with Section 6(2) of the Act. The Parties filed their respective replies to the SCN separately on 01.02.2016 ("**Response to SCN**") along with a request for oral hearing, in terms of Regulation 48 of the General Regulations.

7. In its meeting held on 21.07.2016, the Commission considered the Response to SCN and decided to grant an oral hearing to the Parties on 16.08.2016. On 16.08.2016, the Parties sought adjournment due to non-availability of their respective counsel. The Commission, considering the request of the Parties, decided to grant an oral hearing on 06.10.2016. Accordingly, the Parties presented their case before the Commission on 06.10.2016 and also made written submissions at the time of hearing. However, PSP vide application dated 13.10.2016, requested the Commission to grant further hearing in the matter in order to allow it to make certain additional submissions. The request was accepted by the Commission and oral hearing was given on 24.11.2016.

8. The Parties have submitted that Section 6(2) of the Act cannot be interpreted to include an agreement which does not specify the key elements/conditions of the combination. Such an agreement would be incomplete, and not sufficiently definitive to serve the basis for filing a notice with the Commission. Accordingly, the Parties submitted that relevant documents entered into between them in relation to the Combination were the SA and the Agreed Structure. It has been further submitted that the SA was an interim agreement to record the mechanism of the Combination and the relevant *"agreement or other document"* for the purpose of Section 6(2) of the Act is the Agreed Structure and not the SA. The Parties made the following arguments in support of their aforesaid contention.

8.1 That since a number of critical and practical elements of the dissolution were not agreed upon between the Parties at the time of signing of the SA, the Parties had agreed to appoint KPMG to determine these terms in the form of a binding third party ruling. The terms to be determined by KPMG included the following:

i. *Equity Value*: The proportion of equity value of IIN to which each PSP and GIC were entitled to, based on their respective interests in IIN (taking into account various claims each party had against the other) ("**Equity Split**");

ii. *Estimated Adjustment Payment*: The amount which would be paid by either PSP or GIC to the other to the extent that the Equity Split did not correspond to the value of the Road Business and the Energy Business, being the proposed split of assets between the Parties in the SA;

iii. *Settlement of the Estimated Adjustment Payment*: As per the terms of the SA, if the Estimated Adjustment Payment exceeded a certain threshold, the paying party had the right to ask KPMG to settle the payment obligations by allocating to the receiving party certain assets that were originally allotted to the paying party ("**Acceptable Assets**");

iv. *Transaction Structure*: The plan for the break-up of the joint venture, based on the agreed asset split, in terms of the legal transactions required to effect the break-up; and

v. *Steps Plan*: A detailed steps plan flowing from KPMG Tax Structure Paper and setting out the detailed steps required to effect the break-up as agreed by the Parties ("**Steps Plan**").

8.2 That as the aforesaid terms were to be determined by KPMG at the time of execution of the SA, the Parties did not know (i) what share of the value of the joint venture each party was entitled to; (ii) which joint venture companies/assets each party would acquire; (iii) which party would pay the other the adjustment payment; (iv) how much such payment would be; and (v) how or when the dissolution would be effected. Based on the aforesaid, the Parties submitted that to treat SA as the trigger event for the Combination would not reflect the legal, commercial or practical reality.

8.3 That the above considerations were directly relevant to the notice that had to be filed with the Commission as the Parties would not have been able to accurately assess the requirement to report the Combination without there being certainty about the allocation of assets. A change in allocation of assets would have impacted the threshold assets and the asset reclassification would have also had impact on the competition assessment to be carried out by the Commission and the Parties would have had to re-notify the revised combination in the event of any change in any of the aforesaid elements.

8.4 That the SA alone was merely an agreement to agree on dissolution of IIN, and was not an agreement for acquisition of the assets of IIN by the Parties. In this regard, the Parties made reference to following clauses of the SA to point out that they intended to be bound by the KPMG determinations and the asset split as accepted in the Agreed Structure for the purpose of reaching an agreement on the "acquisition" and not just the SA in effecting the Combination.

i. As per clause 2.4 of the Settlement Agreement**,** *"[...]"*
ii. As per clause 4.6 of the SA, *"[...]"*
iii. As per clause 20.1.3 read with clause 2.4 of the SA, *"[...]"*
iv. *"[...]"*
v. *"[...]"*

9. The Commission noted the submissions made by the Parties in Response to SCN and during the personal hearings granted to the Parties. The Parties in their submissions have maintained that the SA was an interim agreement to record the mechanism of the Combination and the Agreed Structure was the relevant *"agreement or other document"* for the purpose of Section 6(2) of the Act. The underlying rationale behind the submissions of the Parties is that an agreement which

does not specify the key elements/conditions of a combination and is not sufficiently definitive cannot be considered as an *"agreement or other document"* for the purpose of Section 6(2) of the Act. Accordingly, the Commission observed that the key issue to be examined in context of this case is whether the SA or the Agreed Structure constitutes the relevant *"agreement or other document"* for the purpose of Section 6(2) of the Act.

10. Before going into examination of this issue, it would be appropriate to make reference to the various provisions of the Act and The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 ("**Combination Regulations**").

As per Section 6(2) of the Act,

"...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—

(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."(emphasis added)

As per Regulation 5(8) of the Combination Regulations,

"The reference to the "other document" in clause (b) of sub-section (2) of section 6 of the Act shall mean any binding document, by whatever name called, conveying an agreement or decision to acquire control, shares, voting rights or assets:

Provided that if the acquisition is without the consent of the enterprise being acquired, any document executed by the acquiring enterprise, by whatever name called, conveying a decision to acquire control, shares or voting rights shall be the "other document":

[Provided further that where a public announcement has been made in terms of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, for acquisition of shares, voting rights or control, such public announcement shall be deemed to be the "other document".]" (emphasis added)

11. In accordance with the aforesaid provisions of Regulation 5(8) of the Combination Regulations, two elements which are considered as pivotal in interpreting the *"agreement or other document"* for the purposes of Section 6(2) of the Act are:

    i. The agreement should be binding in nature; and

    ii. The agreement should be conveying a decision to acquire control etc.

    Accordingly, it would be appropriate to examine the presence of aforesaid elements in present case.

12. As regards the first element that the agreement should be binding in nature, the Commission noted that the SA was a binding agreement. As per clause 13.1.1 of the SA,

    "[...]"

    While the Parties had submitted that the SA and the Agreed Structure together constitute the binding agreement, it is noted that the SA was not envisaged to become binding on acceptance of the Agreed Structure; but rather SA, by itself, was a binding document.

13. As regards the second element that the agreement shall convey decision to acquire control etc., the Commission noted Recital N of the SA which reads,

    "[...]"

    It is observed that the SA clearly records the decision of the Parties as regards dissolving IIN and GIC acquiring the Energy Business and PSP acquiring the Road Business. Thus, there does not appear to be any uncertainty or ambiguity regarding the definitiveness of the 'Combination' or the scope of the same.

14. As regards the issue of uncertainties pointed out by the Parties, the Commission observed that generally the agreements which are executed in relation to mergers and acquisitions are cross-conditional and open-ended to some extent. In any agreement, there are issues which are kept flexible to be decided in terms of methodologies provided for in the agreement itself and ordinarily, the presence of such conditions does not impact the status of an agreement or other document as a "trigger document".

15. The Commission, however, noted that the Parties had notified the Combination voluntarily after the acceptance of the Agreed Structure based on their interpretation of Section 6(2) of the Act as

regards the *"agreement or other document"*. Further, the Combination was not consummated prior to giving a notice under Section 6(2) of the Act and receiving approval from the Commission. The Commission also observed that the structure of the Combination was unique to some extent given that the transaction involved dissolution of joint venture and subsequent acquisition of respective assets by the Parties and certain material terms were agreed to be finalized subsequently pursuant to determination by a third party.

16. On the basis of aforesaid analysis, the Commission decided that the SA was the relevant *"agreement or other document"* for the purpose of Section 6(2) of the Act and the notice of the Combination should have been filed within 30 days of execution of the SA, i.e., by 30.04.2015. However, considering the specificities of the case, the Commission decided that no penalty is required to be imposed on the Parties in terms of Section 43A of the Act.

17. The Secretary is directed to communicate to the Parties accordingly.