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Fair Competition
For Greater Good

COMPETITION COMMISSION OF INDIA

(Combination Registration No.C-2015/12/349)

13.01.2017

Order under Section 43A of the Competition Act, 2002 ("Act") in relation to combination registration no. C-2015/12/349

Background

1. On 16.09.2015, the Competition Commission of India ("**Commission**") received a notice under sub-section (2) of Section 6 of the Act filed by Schulke India Private Limited ("**Schulke India**"), a subsidiary of Schulke & Mayr GmbH ("**Schulke Germany**/**Acquirer**")[1], seeking Commission's approval of its acquisition of the Healthcare Antisepsis Solutions ("**HAS**") business of Johnson & Johnson Private Limited ("**JJPL**"), a wholly owned subsidiary of Johnson & Johnson, USA ("**J&J**"). This notice (bearing combination registration no. C-2015/08/310) was filed pursuant to the execution of a Country Transfer Agreement between JJPL and Schulke India on 11.09.2015 ("**CTA**").

2. It was stated in the notice that on 25.03.2015, Schulke Germany had entered into a Global Asset Purchase Agreement ("**Global APA**") for acquisition of the Advanced Sterilization Products ("**ASP**") Division of Ethicon, Inc. ("**Ethicon**"), a wholly owned subsidiary of J&J. The Global APA provides for the global acquisition of the HAS business of Ethicon by Schulke Germany, in the territories of Australia, Japan, India, New Zealand and certain other jurisdictions.

3. The Commission, in its meeting held on 10.11.2015, *inter alia*, observed that information regarding global acquisition of Ethicon's HAS business by Schulke Germany was not provided in the notice. On account of lack of information on Air Liquide Group and ASP Division of Ethicon, their role and objectives in the combination, details of their business activities, globally and in India, could not be assessed. Further, the notice did not meet the requirements of sub-regulation (1) of Regulation 9 of the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations,

[1] Schulke Germany is stated to be a wholly owned subsidiary of Air Liquide Deutschland GmbH and is a part of the Air Liquide group of companies (Air Liquid Group).

2011 ("**Combination Regulations**"), as the same was filed by incorrect party i.e. Schulke India and not Schulke Germany, being the acquirer as per the Global APA.

4. Accordingly, in its above said meeting, the Commission was of the view that the Global APA is the binding document for the purposes of the present combination and that Schulke Germany ought to have filed a notice for the global acquisition of the HAS business of Ethicon with the Commission within 30 days of the execution of the Global APA i.e. by 24.04.2015. The Commission therefore,

   a.) decided that the notice filed by Schulke India is not in conformity with the Combination Regulations and therefore, not valid in terms of sub-regulation (1) and sub-regulation (2A) of Regulation 14 of the Combination Regulations; and

   b.) directed Schulke Germany to file a fresh notice, under clause (b) of sub-section (2) of Section 6 of the Act read with sub-regulation (1) of Regulation 9 of the Combination Regulations, in respect of its acquisition of HAS business in India from JJPL.

5. Pursuant to the directions of the Commission, Schulke Germany filed the notice (bearing combination case Registration No. C-2015/12/349) on 07.12.2015, in respect of its global acquisition of the HAS business of Ethicon ("**Combination**"). The Commission, in its meeting held on 15.01.2016, considered the Combination and approved the same under sub-section (1) of Section 31 of the Act. This order, however, was issued without prejudice to any proceedings under Section 43A of the Act.

Proceedings under Section 43A of the Act

6. In view of the facts and circumstances of the case, as mentioned above, the Commission, in the meeting held on 15.01.2016, also decided to initiate proceedings under Section 43A of the Act. Accordingly, on 11.02.2016, a show cause notice was issued to the Acquirer, under Section 43A of the Act read with Regulation 48 of the Competition Commission of India (General) Regulations, 2009, as to why penalty should not be imposed under Section 43A of the Act on them, for violation of sub-section (2) of Section 6 of the Act ("**SCN**"), to which the Acquirer filed its response on 26.02.2016 ("**Response to SCN**").

7. The Commission, in its meeting held on 09.08.2016, considered the Response to SCN and decided to grant an opportunity of oral hearing to Schulke Germany, as requested. The

authorized representative of Schulke Germany was heard on 30.08.2016. Schulke Germany also made certain written submissions on 01.09.2016. The Commission noted that *vide* its written and oral submissions, Schulke Germany made, *inter alia*, following submissions:

7.1 That the CTA is the relevant transaction agreement for the purpose of sub-section (2) of Section 6 of the Act and sub-regulation (8) of Regulation 5 of the Combinations Regulation as: (i) the Global APA did not cause the Indian assets to be transferred; (ii) the precise and final scope of the assets transfer in India was defined in the CTA; and (iii) the CTA is not an amendment to the Global APA and is a separate agreement between different legal entities. In this regard, it has also been submitted that:

7.1.1 the Global APA is a global framework agreement signed by Schulke Germany and Ethicon that formed the basis for them to negotiate the terms of the asset transfer agreement. As the signing parties of the Global APA are not the legal owners of the assets forming the subject matter of the combination in India, the CTA is the document binding on the Parties that causes the transfer of the Indian assets ("**India Transferred Assets**"). The India Transferred Assets are the property of JJPL, an Indian company that is not a party to the Global APA. Therefore, the Global APA by itself would not cause a transfer of the Indian assets.

7.1.2 the Global APA provides that separate agreements and instruments of transfer are required to transfer the HAS Business in each individual country. The Global APA was at best, an in-principle agreement, to agree and was not a binding document; the CTA was the binding document that triggered the filing with the Commission. Further, it is not unusual for such loosely drafted contracts to exist between the Parties when the said framework or in-principle agreement contemplates the execution of definitive, conclusive contracts to be executed in the future, as was the case with the Global APA.

7.1.3 the CTA specified not only the mechanics, but also the precise and final scope of the sale of the Indian unit. Further, the lists of products and assets in the Global APA were indicative and not specific to India. There were other significant terms in the CTA that were very different from those mentioned in the Global APA.

7.1.4 the Commission has taken the view that a document which merely constitutes a step towards the negotiations between the parties in relation to the finalization of the

scheme, valuation, exact scope of the assets to be acquired, share entitlement ratio and also approval of the same by the Board of Directors of the respective parties cannot constitute the trigger event for the purpose of sub-section (2) of Section 6 of the Act.[2] In the present case, the Global APA was a mere step in the negotiations between the parties. It was the CTA which finalised the scope of the assets to be acquired and the consideration.

7.1.5 the CTA and Global APA are governed by different laws and are under the exclusive jurisdiction of separate courts.[…….]. Since the CTA is not executed by the parties to the Global APA, it cannot constitute an amendment to the Global APA.

7.2 That both JJPL and Ethicon are subsidiaries of J&J. However, Ethicon, the entity which has entered the Global APA, does not own or control JJPL, directly or indirectly. JJPL and Ethicon are related through their ultimate parent, i.e., J&J, thereby making their relationship one of "sister" companies and not one of "parent" or holding company and subsidiary. Ethicon could not have executed a binding contract on behalf of its 'sister' company JJPL and it could not have bound JJPL in a valid contract without JJPL's ratification, approval, adoption or confirmation of the Global APA. Further, Ethicon did not bind its ultimate shareholder i.e., J&J at the time of execution of the Global APA with Schulke Germany. In this regard, the Acquirer has referred to following judgements of Hon'ble Supreme Court of India:

7.2.1 In the case of *M/s. Gujarat Bottling Co. Ltd. v. Coca Cola Company*[3], the Hon'ble Supreme Court held that an agreement by a company, to which the shareholder of that company is not a party, cannot have any binding force on the shareholders of the company; and

7.2.2 In the case of *Indowind Energy Ltd. v. Wescare (I) Ltd. and Anr*[4], the Hon'ble Supreme Court has held that, "*It is not in dispute that Subuthi and Indowind are two independent companies incorporated under the Companies Act, 1956. Each company is a separate and distinct legal entity and the mere fact that two companies have common shareholders or common Board of Directors, will not make the two*

[2] Aditya Birla Nuvo Limited/Pantaloon Retail (India) Limited, Order of the Commission dated 14 August 2012 in Combination Reg. No. C-2012/07/69, at paragraph 7.

[3] AIR 1995 SC 2372.

[4] AIR 2010 SC 1793

companies a single entity. Nor will existence of common shareholders or Directors lead to an inference that one company will be bound by the acts of the other. If the Director who signed on behalf of Subuthi was also a Director of Indowind and if the intention of the parties was that Indowind should be bound by the agreement, nothing prevented Wescare insisting that Indowind should be made a party to the agreement and requesting the Director who signed for Subuthi also to sign on behalf of Indowind. The very fact that parties carefully avoided making Indowind a party and the fact that the Director of Subuthi though a Director of Indowind, was careful not to sign the agreement as on behalf of Indowind, shows that the parties did not intend that Indowind should be a party to the agreement. Therefore, the mere fact that Subuthi described Indowind as its nominee or as a company promoted by it or that the agreement was purportedly entered by Subuthi on behalf of Indowind, will not make Indowind a party in the absence of a ratification, approval, adoption or confirmation of the agreement dated 24.2.2006 by Indowind."

7.3 That the transaction contemplated under the Global APA can avail the exemption under Notification No. SO 482 (E) dated 4th March 2011, as amended by the Corrigendum No. SO 1218 (E) dated 27th May 2011 ("***De Minimis* Exemption**"), which exempts acquisitions of a target enterprise with assets not more than INR 250 crores or turnover not more than INR 750 crores in India. Ethicon (on a consolidated basis) does not have any assets amounting to INR 250 crore in India, and its turnover generated in India does not exceed INR 750 crore in India. In the event the Global APA is considered to be the trigger event under the Act, the parties to the combination would be Ethicon and Schulke Germany. Schulke Germany had considered the requirement of filing of a notice with the Commission and considering that the value of assets and turnover of Ethicon in India are less than the thresholds prescribed in the *De Minimis* Exemption, Schulke Germany understood that it would be able to avail the exemption provided therein. It has also been mentioned that Competition Appellate Tribunal has recently observed that the applicability of the exemption provided in the *De Minimis* Exemption is unconditional.

7.4 That Schulke Germany had, pursuant to the directions of the Commission, filed the notice bearing registration number C-2015/09/349 on 07.12.2015 with the Commission. The notice was filed by Schulke Germany without prejudice to the contents of the notice filed by Schulke India bearing registration number C-2015/09/310 and letters dated 10.11.2015, 27.11.2015 and 30.11.2015. As mentioned in the notice filed on 07.12.2015, the value of assets and turnover of Ethicon in India were "Nil". The said notice was filed

with the Commission by Schulke Germany as it wanted the approval to close the transaction in India at the earliest to enable the integration of the HAS business.

7.5 That the 30 calendar day period is arguably a redundant remnant of the days prior to the Competition (Amendment) Act, 2007 ("**2007 Amendment Act**") because the 30 day time period is irrelevant when the combination must compulsorily be notified and also since parties cannot in any case close the transaction till such time as the Commission approves it. The Act remains one of the few competition statutes internationally that insist on parties to file within a specified time period of 30 days of executing an agreement or other document. It would result in a legal absurdity if the Commission would insist that parties enter into a definitive contract and arrangements merely to comply with the 30 day deadline under Section 6(2) of the Act.

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

8.1 As per sub-section (2) of Section 6 of the Act, a notice in respect of a proposed combination is required to be filed with the Commission, disclosing the details of the combination, within 30 days of execution of any agreement or other document. Clause (b) of sub-section (2) of Section 6 of the Act uses the term "*any agreement*" which is indicative of intention to treat "*any agreement*" as the trigger document so long as the agreement pertains to an acquisition that meets the thresholds under Section 5 of the Act. The Act does not mandate that the "agreement" must be India-specific. It is also noted that even if the parties to the combination did not enter into CTA, the acquisition of HAS Business of Ethicon by Schulke Germany would have still been notifiable to the Commission, in terms of sub-section (2) of Section 6 of the Act on the execution of Global APA, as the parties to the combination meet the jurisdictional thresholds prescribed under Section 5 of the Act.

8.2 In relation to distinction between global agreement and local agreement, the Commission in its order issued under Section 43A of the Act in the case of Baxalta/Baxter (C-2015/07/297) has held that "*.... GSDA* [Global Agreement] *was a binding document executed between Baxter and Baxalta on 30.06.2015 for the purpose of the combination and thus satisfied the requirements of sub-section (2) of Section 6 of the Act. Thus, the argument of the Acquirer that the trigger event for the merger notification in India would be the local implementation agreement for the India*

Separation is not valid." Similar observation was made by the Commission in its order issued under Section 43A of the Act in the case of *Eli Lilly/Novartis (C-2015/07/289).* The Commission in the said order[5] observed that *".....In relation to the relevant trigger document in the instant case, the Commission noted that the combination relates to Eli Lilly's acquisition of the global veterinary pharmaceuticals business of Novartis. Though, the parties had entered into the local SSA for the purposes of the transfer of the India business, the SAPA sets out the material terms and conditions pertaining to the transfer of NAH to Eli Lilly and create a binding obligation on the parties. Further, SAPA also provides that in case of conflict between SAPA and the local agreement to be executed between the Parties, SAPA will prevail over the said local agreement. It is observed that upon the execution of the SAPA and the satisfaction of the thresholds under Section 5 of the Act by the parties to the SAPA (viz., Novartis and Eli Lily), filing obligation under sub-section (2) of Section 6 of the Act was triggered. Accordingly, the Commission is of the considered view that the agreement for acquisition under clause (b) of sub-section (2) of Section 6 of the Act is the SAPA dated 22.04.2014 executed between Eli Lilly and Novartis and not the SSA entered into between Elanco India and Novartis India on 03.12.2014."*

8.3 The Commission in its above said two orders also observed that *".....in cases of global combinations (as in the present case), if the parties to the combination notify the combination to the Commission only upon the execution of a local agreement and not after execution of the global agreement, in spite of meeting jurisdictional thresholds prescribed under Section 5 of the Act, then there is possibility that the combination would be consummated at the global level even before the Commission has assessed the same under the relevant provisions of the Act (as has happened in the instant case). In such a situation, the independent market behaviour of the parties to the combination has already ceased even before the Commission carried out its assessment of the combination, which would defeat the purpose of the suspensory regime of regulation of combinations provided by Section 5 and 6 of the Act."* Thus, applying the same principle in the instant case, the Global APA must be treated as the trigger document for the purpose of sub-section (2) of Section 6 of the Act.

[5] In the said case, Local SSA (Slump Sale Agreement) was the local agreement signed for the combination in India by the Indian entities whereas SAPA (Stock and Asset Purchase Agreement) was the global agreement signed between the parties to the combination.

8.4 It is also noted that the press release of Air Liquide Group including the related media reports on the instant acquisition, both globally and in India, have reported this transaction as a global acquisition of Ethicon's HAS business by the Air Liquide Group. Thus, the combination relates to the global acquisition of the HAS business of Ethicon by Schulke Germany (direct acquirer within the Air Liquide Group) pursuant to the Global APA, and accordingly, the Global APA is the relevant agreement that triggers the filing obligation under Clause (b) of sub-section (2) of Section 6 of the Act.

8.5 [….]

8.6 In this relation, the Commission in its order issued under Section 43A of the Act in *GE/Alstom* [C-2015/01/241], had also observed that "…..*in the event the initial understanding between the parties undergoes a change, then the Combination Regulations provide for the situations where the parties to the combination can inform the Commission about changes in the proposed combination. Regulation 16 of the Combination Regulations provide for the procedure to intimate changes in the information provided in the notice…… These provisions are of relevance to suggest that the Combination Regulations, in fact, perceives the possibility of a notified combination undergoing subsequent changes even to the extent of rescinding the very transaction.*"

8.7 It is further noted that the CTA states "*the Advanced Sterilization Products ("ASP"), a division of Ethicon Inc. and Schulke Germany entered into a framework Asset Purchase Agreement ("APA") on March 25, 2015. On the basis of this APA, Seller and Buyer are entering into this Agreement. This Agreement specifies the scope and mechanics for the sale of the India business*". Thus, a bare reading of the CTA brings out the fact that the CTA was never intended to be the primary document based on which Schulke Germany or Schulke India acquired the HAS business. Accordingly, the purpose of the CTA was only to specify the mechanics and scope of the business to be transferred in India. The Global APA was the basis of the CTA and the Global APA itself created an obligation on the parties for the transfer of target business worldwide (including India).

8.8 It is further noted that though the CTA causes the asset transfer (i.e. it is the agreement that transfers title of the assets to Schulke India), […]

8.9 Further, CTA also provides that "*In the event of any conflict between APA and this Agreement, the terms of APA shall prevail."* Thus, it is clear that the Global APA shall prevail in case of any inconsistency between the Global APA and the CTA, thereby lending credence to the observation that the Global APA was always intended as the trigger document. In this regard, the Commission in its order issued under Section 43A in *Eli Lilly/Novartis (C-2015/07/289)* took cognisance of the fact that global agreement would prevail over local agreement while concluding that the global agreement is the trigger document under sub-section (2) of Section 6 of the Act[6].

8.10 Accordingly, as referred to in the Global APA, the CTA is only a short-form agreement for implementing the transfer of HAS business, the terms and conditions of which have already been identified and set out in the Global APA. As such, it is the Global APA which is the relevant agreement for acquisition in the present combination for the purposes of sub-section (2) of Section 6 of the Act. The execution of the Global APA binds Schulke Germany in relation to its global acquisition of the HAS business of the ASP Division of Ethicon, including India.

8.11 Further, the Acquirer's reliance on the Commission's order in *Aditya Birla Nuvo Limited/Pantaloon Retail (India) Limited* [C-2012/07/69] is misplaced, as the referred case pertained to the parties filing a notice with the Commission on the basis of an Memorandum of Understanding (MoU) whose terms and conditions made it clear that the MoU (even though binding) was only "*an interim arrangement*" that will "*terminate immediately on the execution of the implementation agreement or if the scheme does not get the approval by the Board of Directors of the respective parties*". Therefore, the MoU in that case was an intermediary document whose termination was certain, thereby necessitating another approval by the board of directors. In the instant case, the Global APA establishes the particulars of the assets, employees and products being transferred and sets out the obligations of its signatories in relation to the transfer of the business. Accordingly, the Global APA does not constitute a step towards negotiation, as claimed by the Acquirer.

8.12 Also, the Commission in its order issued under Section 43A of the Act in *Johnson & Johnson Innovation/Ethicon/Google* [C-2015/06/283] observed as follows:

[6] In the said order the Commission observed that *"……SAPA also provides that in case of conflict between SAPA and the local agreement to be executed between the Parties, SAPA will prevail over the said local agreement….."*

"*With regard to the submission of the Parties that sub-section (2) of Section 6 of the Act affords discretion as to which agreement or document should be deemed relevant for the purposes of trigger for filing, it is observed that if the argument of the Parties is accepted, it would mean that parties may keep amending the transaction documents and thereby keep postponing the notification timelines. This would render the statutory timeline of filing a notice within 30 days of the execution of the agreement for acquisition, meaningless*."

8.13 The contention of the Acquirer that the Global APA does not bind JJPL, is of no relevance to determine the notification requirements under the Act. In this regard, it is noted that Section 6(2) of the Act read with Regulation 9(1) and 9(3) of the Combination Regulations sets a distinction between (a) an acquisition and (b) a merger/amalgamation, w.r.t. the trigger requirements. In case of an acquisition, the onus of filing the notice is on the acquirer and the notice is to be filed within 30 days of "*execution of any agreement or other document for acquisition*"; whereas in the case of a merger, the onus of filing the notice is on both the parties involved in the merger/amalgamation and the notice is to be filed within 30 days of "*approval of the proposal relating to merger or amalgamation….by the board of directors of the enterprises concerned with such merger or amalgamation*". As per provisions of the Act and the Combination Regulations, the obligation to file notice in the present case is on the acquirer i.e. Schulke Germany (a signatory to Global APA), irrespective of the fact whether the same is binding on JJPL or not. Therefore, Schulke Germany ought to have filed the notice with the Commission within 30 days of execution of the Global APA under Section 6(2) of the Act read with Regulation 9(1) of the Combination Regulations.

8.14 In this regard, it is also noted that the European Court of Justice in *Viho* v *Commission* (Case C-73/95 P) has held that "*a parent company and its subsidiaries form a single economic unit within which the subsidiaries do not enjoy real autonomy in determining their course of action in the market, but carry out the instructions issued to them by the parent company*". In the instant case, since Ethicon is a wholly owned subsidiary of J&J, it could not have taken an independent decision to enter into an agreement without the necessary consent of J&J. Since JJPL is also a wholly owned subsidiary of J&J and has entered into an interconnected agreement (CTA) with respect to the APA, it is apparent that the parties intended JJPL to be part of the composite scheme of the

transaction. Without this understanding, Schulke Germany could not have entered into the Global APA with Ethicon for acquiring ASP Business globally and HAS Business in India.

8.15 Further, it has been stated at paragraph 57 of the Notice that "*Ethicon conducts its activities in India through JJPL*." Also, paragraph 63 of the Notice states that "*Ethicon's products in India are sold through JJPL*." Therefore, it is noted that JJPL is not merely a sister company of Ethicon but conducts HAS business in India on behalf of Ethicon. Thus, the contention of the Acquirer that Global APA was not binding on JJPL cannot be accepted.

8.16 The Acquirer's contention that the Global APA is not the trigger document hinges on their submission that JJPL is not a party to the Global APA. This seems to suggest that an Indian company necessarily would have to be a party to a "global agreement", executed in order for the global agreement to trigger the notification requirements. This is not correct, as there are many combination cases where the notice has been filed with the Commission based on global agreement even if the Indian entities are not part of the global agreement.

8.17 In relation to the arguments given through referring to two Supreme Court Judgements referred by the Acquirer i.e. *M/s. Gujarat Bottling Co. Ltd. v. Coca Cola Company* and *Indowind Energy Ltd. v. Wescare (I) Ltd. and Anr*, it is noted that in the case of *Chloro Controls (I) P. Ltd.* Vs *Severn Trent Water Purification Inc. and Ors*[7], the Hon'ble Supreme Court has held as follows:

> *"…the Courts under the English Law have, in certain cases, also applied the "Group of Companies Doctrine". This doctrine has developed in the international context, whereby an arbitration agreement entered into by a company, being one within a group of companies, can bind its non-signatory affiliates or sister or parent concerns, if the circumstances demonstrate that the mutual intention of all the parties was to bind both the signatories and the non-signatory affiliates."*
>
> *"Where the agreements are consequential and in the nature of a follow-up to the principal or mother agreement, the latter containing the arbitration agreement and such agreements being so intrinsically intermingled or inter-dependent that it is*

[7] Civil Appeal No. 7134 of 2012, decided on 28.09.2012

their composite performance which shall discharge the parties of their respective mutual obligations and performances, this would be a sufficient indicator of intent of the parties to refer signatory as well as non-signatory parties to arbitration."

"...an arbitration agreement entered into by a company within a group of companies can bind its non-signatory affiliates, if the circumstances demonstrate that the mutual intention of the parties was to bind both the signatory as well as the non-signatory parties."

8.18 In view of the above said judgement of Hon'ble Supreme Court, it is observed that the non-signatory companies can be bound by signatory affiliates, sister companies and parents, if the mutual intention of all the parties to the agreement was to bind both the signatory and non-signatory affiliates. In the instant case, with reference to the above said judgment, it is noted that

a.) Schulke Germany and Ethicon specifically included the HAS Business in India in the Global APA;

b.) CTA was "*consequential and in the nature of a follow-up to the"* Global APA;

c.) CTA and the Global APA are *"intrinsically intermingled or inter-dependent that it is their composite performance which shall discharge the parties of their respective mutual obligations and performances"*

In view of the foregoing, the circumstances demonstrate that the mutual intention of the parties was to bind both the signatory as well as the non-signatory parties i.e. the parties to the Global APA always intended that JJPL is also bound by the obligations contained in the Global APA.

8.19 It is further observed that the *De Minimis* Exemption as applicable on the date of execution of Global APA read as under:

"In exercise of the powers conferred by clause (a) of Section 54 of the Competition Act, 2002 (12 of 2003) the Central Government, in public interest hereby exempts an enterprise, whose control, shares, voting rights or assets are being acquired has assets of the value of not more than INR 250 crores in India or turnover of no more

than INR 750 crores in India from the provisions of Section 5 of the said Act for a period of 5 years" (emphasis added).

Thus, for the purpose of determining applicability of *De Minimis* Exemption, the value of assets and turnover of the target enterprise (i.e. the entity whose control, shares, voting rights or assets are being acquired) is to be considered. Under the proposed combination, the entity whose assets were being acquired in India was JJPL and therefore, the value of assets and turnover of JJPL is to be considered for the purpose of determining the applicability of *De Minimis* Exemption. The value of assets and turnover of JJPL for the year ending on 31.03.2014 were Rs. 2702.89 crore and Rs. 4454.43 crore, respectively, which exceed the thresholds provided by *De Minimis* Exemption both in terms of value of assets and turnover. Thus, the exemption provided by the *De Minimis* Exemption was not available to the Acquirer in respect of the proposed combination.

8.20 In this regard, it is important to note the language of the Section 5 which reads as under:

"The acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises shall be a combination of such enterprises and persons or enterprises, if—

(a) any acquisition where—

(i) the parties to the acquisition, being the acquirer and ***the enterprise, whose*** *control, shares, voting rights or* ***assets*** *have been acquired or* ***are being acquired*** *jointly have……"*
(emphasis added)

Thus, for the purpose of determining whether the parties to the acquisition meet the thresholds provided under Section 5(a) of the Act, the value of assets and turnover of the acquirer and the target enterprise (i.e. the entity whose control, shares, voting rights or assets are being acquired) are to be considered. In the instant case, though at the global level, the assets of Ethicon were being acquired, however in India, assets of JJPL were being acquired. Accordingly, for the purpose of calculation of thresholds under Section 5(a) of the Act, the value of assets and turnover of JJPL in

India would be considered. Based on the same, the combination is notifiable under clause (a) of Section 5 of the Act.

8.21 In relation to the contention of the Acquirer that 30 calendar day period is redundant, it is noted that the legislature, in its wisdom, while passing the 2007 Amendment Act, has kept the requirement of notification of a proposed combination within 30 days. The Commission, in its practice, cannot dispense with such a requirement laid down by the Act passed by Parliament of India.

9. It is further noted that the Hon'ble Supreme Court has held in *The Chairman, SEBI v Shriram Mutual Fund and Anr.*[8], 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…".*

10. In view of the foregoing, the Commission is of the opinion that the Acquirer failed to give notice to the Commission in accordance with the requirements of sub-section (2) 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.*"

11. As per the details provided, the higher of the turnover or assets of the combination is approximately USD 81 million. Accordingly, in terms of Section 43A of the Act, the Commission can levy a maximum penalty of one per cent of USD 81 million (approximately INR 535 crore). 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 considered totality of factors, while determining the quantum of penalty. In view of the foregoing, applying the principles of proportionality, the

[8] In Supreme Court; Civil Appeal Nos. 9523-9524 of 2003. Decided on 23.05.2006.

Commission considered it appropriate to impose a penalty of INR 25,00,000/- (INR twenty-five lakhs only) on the Acquirer, which is well within the limits as prescribed under the Act.

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

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