सत्यमेव जयते

Fair Competition
For Greater Good

COMPETITION COMMISSION OF INDIA

(Combination Registration No. C-2015/09/312)

7th June, 2017

Order under Section 43A of the Competition Act, 2002 against Avago Technologies Limited in relation to Combination Registration No. C-2015/09/312

1. On 28th September, 2015, the Competition Commission of India ("**Commission**") received a notice given by Avago Technologies Limited ("**Avago**"), pursuant to an enquiry initiated under sub-section (1) of Section 20 of the Competition Act, 2002 ("**Act**"), for acquisition of Broadcom Corporation ("**Broadcom**") by Avago. For the purpose of the acquisition an Agreement and Plan of Merger was executed, *inter alia*, between Avago and Broadcom on 28th May, 2015 (**"Agreement"**). (Hereinafter, Avago and Broadcom are collectively referred to as the "**Parties**").

Background

2. The Commission, based on media reports, initiated an inquiry under sub-section (1) of Section 20 of the Act in the above said acquisition and *vide* letter dated 12th August, 2015, directed Avago to provide data / information on the asset and turnover of the Parties. Pending Commission's inquiry under sub-section (1) of Section 20 of the Act, Avago filed a notice of combination on 28th September, 2015 along with its response to the Commission's letter dated 12th August, 2015.

3. The Commission, in its meeting held on 16th December 2015, approved the said combination under sub-section (1) of Section 31 of the Act without prejudice to any penalty proceedings that may be initiated under Section 43A of the Act. Accordingly, *vide* letter dated 2nd February, 2016, the Commission issued a show cause notice ("**SCN**"), 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, as to why penalty, in terms of Section 43A of the Act, should not be imposed on Avago for not filing the notice within thirty days of execution of binding document. Avago submitted its

response to show cause notice on 7th March, 2016 ("**Response to SCN**"). Further, Avago made certain submissions *vide* its letter dated 16th February, 2017.

Proceedings under Section 43A of the Act

4. In terms of sub-section (2) of Section 6 of the Act, any person or an enterprise, who or which proposes to enter into a combination, is required to give notice to the Commission, disclosing the details of the combination, within thirty days of execution of any agreement or other document for acquisition. 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)

5. The Commission observed that the Agreement was signed on 28th May, 2015. Further, the Parties, for the reasons set forth in subsequent paragraphs, satisfy jurisdictional threshold, in terms of combined assets and turnover of the Parties, as provided in Section 5 of the Act. Accordingly, in terms of sub-section (2) of Section 6 of the Act, Avago ought to have filed the Notice regarding the combination with the Commission within thirty days of the execution of the Agreement *i.e.* by about 26th May, 2015. However, the Parties filed a Notice in Form I only on 28th September 2015, subsequent to initiation of an inquiry under sub-section (1) of Section 20 of the Act, with a delay of approximately 123 days. In view of the above, the Commission was of the *prima facie* opinion that Avago failed to give notice of the combination within the time stipulated under sub-section (2) of Section 6 of the Act. The Commission observed that failure to give notice in accordance with sub-section (2) of Section 6 of the Act attracts penalty under Section 43A of the Act.

Submissions of Avago

6. Avago, *vide* its letters dated 28th September, 2015 and 7th March, 2016, has submitted that Broadcom has two wholly owned Indian subsidiaries in India viz, Broadcom

Communications Technologies Pvt. Ltd. ("**BCTPL**") and Broadcom Semiconductors India Private Limited ("**BSIPL**") and that the assets and turnover of Broadcom for financial year ending 31st March, 2015 was about [….], respectively. It has further been submitted that out of total revenue of approximately [….], [….] was intra-group export revenue. Therefore, Broadcom had turnover of only [….] in India. Thus, Avago has contended that the said transaction was exempt from any notification requirement under Government of India Notification No. S.O. 482(E) dated 4th March, 2011 (as amended by the Ministry of Corporate Affairs Corrigendum No. S.O. 1218(E) dated 27th May, 2011) ("**Target Exemption**" / "***De Minimis* Exemption**") as combined turnover of BCTPL and BSIPL (i.e. the target enterprise) in India is less than INR 750 crore for the financial year ending 31st March, 2015.

7. The Commission, in its meeting held on 13th December, 2016, considered the Response to SCN and decided to grant a personal hearing to Avago, on their request. The authorized representative of Avago appeared before the Commission on 14th February, 2017. The Commission noted that *vide* its written and oral submissions, Avago has made, *inter alia*, the following submissions:

7.1 The combination was exempt from the provisions of the Act by virtue of the *De Minimis* Exemption and Avago has not violated sub-section (2) of Section 6 of the Act by failing to give notice to the Commission within 30 days of executing the binding agreement. Further, Avago has stated that failure to give notice under sub-section (2) of Section 6 is a prerequisite for the Commission to levy penalty under Section 43A of the Act. Since, this prerequisite is absent, Section 43A is inapplicable.

7.2 The Commission does not have jurisdiction to consider this transaction and that this issue should have been addressed prior to the Commission issuing a SCN under Section 43A of the Act.

7.3 It has been submitted that the present transaction qualifies for the *De Minimis* Exemption for three reasons:

7.3.1 The comprehensive assessment of the said transaction by the parties conducted prior to the notification had suggested that the merger filings were required in certain other countries but not in India. Acting with reasonable care in this assessment, the parties concluded that the transaction is not subject to the duty of pre-notification to the Commission under sub-section (2) of Section 6 of the Act.

7.3.2 The entire turnover of BCTPL and BSIPL for the financial year ended 31st March, 2015, was on account of intra-group research & development and marketing support services for the international Broadcom Group as a whole, and is entirely intra-group turnover. Under the accounting procedures followed by Broadcom namely, US GAAP, intra-group sales are eliminated from revenue reporting at the group level and therefore do not count as reportable revenues and should be excluded from consideration.

7.3.3 In addition, the Notes to Form-II of the Combination Regulations provide that *"[f]or the purpose of figures in this Form the accounting standards, as notified by the Government of India, from time to time, or the International Financial Reporting Standards or the US Generally Accepted Accounting Principles shall be followed."*

7.4 In support of its above said contention, Avago has claimed that the definition of an "enterprise" under the Act suggests entities forming part of the same group should be considered as a single economic entity. Avago has contended that in calculating the applicable turnover thresholds, the Act looks at the value of sales of goods or services generated by that single economic entity. Further, it is contended that nowhere does the Act state or suggests that "turnover" includes the value of goods transferred within that economic entity and that the Commission has not published any opinion or interpretation treating intra-group revenues within a single enterprise as turnover for these purposes. Furthermore, an interpretation contrary to the above would be inconsistent with Indian Accounting standards, as well the accounting practices of other jurisdictions.

7.5 Avago has further submitted that it would be incorrect to apply such a standard when no language in the Act, the published decisions and interpretations of this Commission,

Indian accounting standard, or the accounting standards of the countries in which the parties are based state that intra-group revenue should be treated as turnover.

7.6 Avago has also submitted that the combination was consummated only after the Parties received approval of the Commission.

Observations of the Commission

8. The Commission, having examined and analysed the submissions of Avago, observed as follows:

8.1 The said transaction is a notifiable combination (for the reasons set out in the latter sections) since it does not qualify for *De Minimis* Exemption and accordingly, the Commission proceeds under Section 43A of the Act read with Regulation 48 of the General Regulations.

8.2 The fact that the Commission had approved the combination under sub-section (1) of Section 31 of the Act, *vide* its order dated 16th December, 2015, confirms that the Commission had ascertained its jurisdiction over the combination. An order under sub-section (1) of Section 31 of the Act can be passed only in case of a combination (as defined under Section 5 of the Act).

8.3 In the present case, Avago submitted notice in Form I along with response to the Commission's communication dated 12th August, 2015, subsequent to initiation of enquiry under sub-section (1) of Section 20 of the Act, with a delay of approximately 123 days from the date of execution of binding document. Further, the Commission observed that Avago did not avail of the facility of pre-filing consultation offered by the Combination Division.

8.4 As regards turnover, in terms of Section 2(y) of the Act, "turnover" includes "value of sale of goods or services". Thus, the statutory definition of turnover under the Act does not provide that goods or services provided to group-entities are to be excluded. In this regard, it is noted that in terms of explanation (c) to Section 5 of the Act,

"the value of assets shall be determined by taking the book value of the assets as shown, in the audited books of account of the enterprise, in the financial year immediately preceding the financial year in which the date of proposed merger falls, as reduced by any depreciation, and the value of assets shall include the brand value, value of goodwill, or value of copyright, patent, permitted use, collective mark, registered proprietor, registered trade mark, registered user, homonymous geographical indication, geographical indications, design or layout- design or similar other commercial rights, if any, referred to in sub-section (5) of Section 3".

8.5 Accordingly, value of turnover is taken as provided in the books of accounts of the enterprise concerned. In the instant case, the turnover of Broadcom (comprising of turnover of BCTPL and BSIPL), as appearing in their books of account, is about [….]. Further, it is noted that the profit and loss statement of BCTPL and BSIPL does not distinguish between the revenue generated through intra-group sales or through sales to third parties.

8.6 Thus, based on the book value, assets and turnover of BCTPL and BSIPL, exceeds the *De Minims* Exemption threshold applicable at that point of time and therefore the said combination becomes a notifiable transaction.

9. In view of the foregoing, the Commission is of the considered opinion that there is a contravention of the provisions of sub-section (2) of Section 6 of the Act as Avago failed to notify the combination within stipulated time.

10. It is reiterated that the fact of approval of the combination on assessment that it does not raise any appreciable adverse effect on Competition ("**AAEC**") in India, based on analysis of various factors does not confer any immunity to the appellants from being penalized under Section 43A of the Act for failure to comply with the regulatory obligation(s) of the party(ies) under the Act. Moreover, the Act clearly provides, irrespective of whether there is any AAEC or not, mandatory regime for notifying a combination to the Commission.

11. The Commission observed that the Parties had not consummated the transaction before an order under Section 31 of the Act was passed, which, at best, can be taken as a mitigating factor to be considered while imposing monetary penalty.

12. In view of the foregoing, it emerges that Avago have failed to give notice to the Commission in accordance with the provision of sub-section (2) of Section 6, 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 assets, whichever is higher, of such a combination"

13. Accordingly, in terms of Section 43A of the Act, a maximum penalty of one per cent of the combined value of worldwide assets of the Parties can be imposed. However, considering the totality of the facts of the case and explanation given by Avago, the Commission deemed it appropriate to impose a penalty of INR 10,00,000/- lakh (INR ten lakh only) on Avago.

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

15. The Secretary is directed to communicate to Avago accordingly.