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Fair Competition
For Greater Good

COMPETITION COMMISSION OF INDIA

(Combination Registration No. C-2016/03/384)

9th June, 2017

Order under Section 43A of the Competition Act, 2002 against Future Consumer Enterprise Limited in relation to Combination Registration No. C-2016/03/384

1. On 21st March, 2016, the Competition Commission of India ("**Commission**") received a notice given by Future Consumer Enterprise Limited ("**FCEL**" or "**Acquirer**") for acquisition of consumer products division business ("**CPD Business**") of Grasim Industries Limited ("**Grasim**") by FCEL. (Hereinafter, FCEL and Grasim are collectively referred to as the "**Parties**").

Background

2. The Commission, on the basis of media report, initiated an inquiry into the abovesaid acquisition of CPD Business of Grasim by FCEL and *vide* its letter dated 20th August, 2015, directed FCEL to provide data / information on the asset and turnover of the Parties. Based on submission dated 15th September, 2015, of FCEL, the Commission took *suo motu* cognizance of the transaction and *vide* letter dated 7th January, 2016, issued direction to FCEL to file notice in Form I within stipulated time on receipt of the communication.

3. FCEL, *vide* its letters dated 5th February, 2016 and 17th February, 2016, contended that the said transaction was exempt from any notification requirement owing to nominal assets and turnover of the CPD Business, and requested the Commission to recall its direction. The Commission noted the submissions of FCEL and *vide* letter dated 2nd March, 2016 directed FCEL to comply with its earlier directions. Accordingly, on 21st March, 2016, FCEL filed notice in respect of the said combination (bearing combination case Registration No.: C-2016/03/384).

4. The Commission considered and approved the combination under sub-section (1) of Section 31 of the Act on 11th May, 2016. The said decision was taken without prejudice to any

penalty which may be imposed or any prosecution which may be initiated against FCEL in accordance with the provisions of the Act.

Proceedings under Section 43A of the Act

5. 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. Further, sub-section (2A) of Section 6 of the Act states that no combination shall come into effect until 210 days have passed from the day on which a notice regarding the combination has been given to the Commission under sub-section (2) of Section 6 of the Act or the Commission has passed orders on the combination under Section 31 of the Act, whichever is earlier.

6. 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)

7. 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*".

8. For the purpose of the combination, FCEL entered into a Business Transfer Agreement ("**BTA**") with Grasim on 22nd May, 2015. As per the requirement of the Act, the notice in respect of the combination ought to have been filed by FCEL within 30 days of the execution of the BTA. However, FCEL filed the notice in Form I only on 21st March, 2016, after the Commission took *suo moto* cognizance of the combination, with a delay of approximately

275 days. Also, FCEL has given effect to the said combination prior to statutory timelines of two hundred and ten days.

9. In view of the above, the Commission was of the *prima facie* opinion that FCEL not only failed to give notice of the combination within the time stipulated under sub-section (2) of Section 6 of the Act but also consummated the same, in contravention of sub-section (2) of Section 6 read with sub-section (2A) of Section 6 of the Act. The Commission observed that failure to give notice in accordance with sub-section (2) of Section 6 read with sub-section (2A) of Section 6 of the Act attracts penalty under Section 43A of the Act.

10. Accordingly, the Commission, in its meeting held on 11th May, 2016, decided to initiate proceedings under Section 43A of the Act read with Regulation 48 of the Competition Commission of India (General) Regulations, 2009 ("**General Regulations**"). A show cause notice was issued to FCEL on 8th June, 2016 ("**SCN**") under Section 43A of the Act read with Regulation 48 of General Regulations to explain, in writing, within 15 days of the receipt of the SCN as to why penalty should not be imposed on FCEL for consummating the said combination without filing a notice in respect of the abovesaid combination, thereby contravening provisions of sub-section (2) of Section 6 and sub-section (2A) of Section 6 of the Act. FCEL filed its response to the SCN *vide* letters dated 23rd June, 2016, 21st July, 2016 and 8th August, 2016 ("**Responses to SCN**").

Submissions of FCEL

11. The Commission, in its meeting held on 15th November, 2016, considered the Responses to SCN and decided to grant a personal hearing to FCEL, as per their request. The authorized representative of FCEL appeared before the Commission on 29th November, 2016. The Commission noted that *vide* its written and oral submissions, FCEL has made, *inter alia*, the following submissions:

11.1 The combination was exempt from the provisions of the Act by virtue of the Notification No. S.O. 482(E) dated 4th March, 2011("**Target Exemption**" / "**De Minimis**

Exemption")[1]. FCEL has submitted that it was under a *bona fide* belief that the transaction does not amount to a notifiable combination under the Act as the Target Exemption would be applicable to the target business, i.e., the assets and turnover of the relevant business being acquired and not the entire assets and turnover of the seller / target enterprise. Thus, filing would only have been required had the thresholds contained in the Target Exemption been applied to the ultimate parent of the target business *i.e.*, Grasim, and not to the CPD Business. It was erroneous on the part of the Commission to have considered the value of assets and turnover of Grasim, *i.e*., the seller entity, as opposed to the actual business being acquired, i.e., the CPD Business, while assessing the applicability of the Target Exemption.

11.2 FCEL has argued that the target (*i.e.* CPD Business), which is an "unincorporated business" should qualify as an "enterprise" and the thresholds under the Target Exemption should apply to such an "unincorporated business" which is being purchased by FCEL. It has been further submitted that if this is not held to be the correct position, *i.e.*, an "unincorporated business" is not held to be an "enterprise", the acquisition of the target (*i.e.* CPD Business) will fall outside the scope of Section 5 of the Act as it applies to the acquisition of one or more "enterprises" by one or more persons or a merger/amalgamation of "enterprises", which would not necessitate a filing of notice.

11.3 FCEL further argued that as per the rule of construction, if the legislature uses the same expression in the same statute at two places or more, the same interpretation should be given to that expression unless context requires otherwise. Accordingly, if the term "enterprise" includes an unincorporated business" for the purposes of Section 5 of the Act, then the term "enterprise" in the Target Exemption should also be read to include such "unincorporated business" and *vice-versa*.

11.4 On the basis of the foregoing, FCEL has argued that the transaction falls in category of De Minimis Exemption on account of marginal asset [….] of the target business (*i.e.* CPD Business) in India, which is much below the prescribed threshold of INR 250 crores and turnover of [….] in India, significantly below the prescribed threshold of INR 750 crores.

[1] As amended by the Ministry of Corporate Affairs Corrigendum No. SO 1218(E) dated 27th May 2011.

11.5 FCEL has further submitted that the objective behind the Target Exemption is to exclude transactions from being notified to the Commission, where the target being acquired is not significant enough to cause any competition concerns.

11.6 In terms of assessing whether a transaction has an appreciable adverse effect on competition ("**AAEC**") or not, it is only the actual business segment being acquired that ought to be examined by the Commission. In light of this, it is only the value of asset and/or turnover from the relevant business, which should be considered, while assessing thresholds. Furthermore, the transaction does not cause nor is likely to cause an AAEC, as has been held by the Commission in its order under sub-section (1) of Section 31 of the Act. As the transaction in the current case does not cause any AAEC in India, no inquiry should have been initiated under sub-section (1) of Section 20 of the Act.

11.7 In addition, it has also been submitted that such narrow interpretation of Section 5 and Section 6 of the Act by the Commission would render the provisions of the Target Exemption nugatory and violate Article 19 (1) (g) of the Constitution of India, amounting to unreasonable restrictions on the freedom of trade and profession guaranteed under the said Article.

11.8 FCEL has submitted certain mitigating factors such as there was no intention on the part of FCEL to conceal the transaction and any failure on the part of FCEL was inadvertent. FCEL has further requested that since combination is limited to the personal care division of the target, *i.e.*, the CPD Business of the target, only the assets and turnover of the relevant business should be taken into consideration in case penalty, if at all, is imposed on FCEL.

Observations of the Commission

12. The Commission having examined and analysed the submissions of FCEL, observed as follows:

12.1 The said transaction is a notifiable combination (for the reasons set out in the latter sections) and does not qualify for the De Minimis Exemption and accordingly, the

Commission proceeds under Section 43A of the Act read with Regulation 48 of the General Regulations.

12.2 In relation to the contention of FCEL that an "unincorporated business" should qualify as an "enterprise" and if this is not held to be the correct position, the acquisition of the target (*i.e.* CPD Business) will fall outside the scope of Section 5 of the Act; the Commission observes that this line of argument is not maintainable as Section 5(a)(i) of the Act provides that "*…whose control, shares, voting rights or assets have been acquired or are being acquired…".* Thus, inclusion of word "assets" in the above said provision emphasizes upon the fact that Section 5 of the Act considers both acquisition of enterprise and acquisition of assets of an enterprise (which has been termed by FCEL as "unincorporated business") as combination, among others, subject to the meeting of thresholds by the parties to the combination.

12.3 In relation to the contention of FCEL that *as per the rule of construction, if the term "enterprise" includes an unincorporated business" for the purposes of Section 5 of the Act, then the term "enterprise" in the Target Exemption should also be read to include such "unincorporated business" and vice-versa,* the Commission observes that the Target Exemption leaves no ambiguity as it only provides that assets and turnover of the target "enterprise" is to be considered for looking into the aspect of *de Minimis exemption* for a combination. Thus, non-inclusion of word "assets" / "unincorporated business" (as coined by FCEL) *etc.* in the Target Exemption leaves no room for interpreting the word "enterprise". In this regard, the decisional practice of the Commission has been consistent. Thus, assets and / or turnover of a business division of an enterprise, such as the CPD Business, in the instant case, cannot be taken into account for considering assets and / or turnover for Target Exemption.

12.4 Hence, the Target Exemption, which exempts an acquisition from the provisions of Section 5 of the Competition Act, where the target enterprise has either assets of less than INR 250 crores (erstwhile thresholds) in India or turnover of less than INR 750 crores (erstwhile thresholds) in India, would apply to Grasim and not to the CPD Business of Grasim.

12.5 In relation to the contention of FCEL that the Commission does not have any informal guidance on its website on the manner in which the Commission calculates the value of assets and turnover for purposes of the jurisdictional thresholds of Section 5 of the Act, it is made clear that the Commission offers pre-filing consultation to anyone which requires clarification on the filing requirements. In the instant case, FCEL did not avail of the facility and never approached the Commission for any clarification on the filing requirements in respect of the present combination.

12.6 As regards the contention of FCEL that *the purpose of Target Exemption is to exclude transactions from being notified to the Commission, where the target being acquired was not significant enough to cause any competition concerns,* the Commission observes that FCEL has wrongly interpreted the 'target' to be a 'business unit' instead of 'enterprise' as per the De Minimis Exemption. Furthermore, once the notification is required under the provisions of the Act it cannot be presumed by the parties to the combination that a given combination may not raise AAEC in India; and it is prerogative of the Commission to assess whether a combination is capable of raising any AAEC concern in India or otherwise. Thus, the presumption of the parties to the combination that a transaction is not likely to raise any AAEC in India, does not waive off their regulatory obligation from notifying such combination(s).

13. As discussed in detail above, in the instant case there is a contravention of the provisions of sub-section (2) of Section 6 and sub-section (2A) of Section 6 of the Act as FCEL did not notify the combination within stipulated time and consummated the same. Thus, the Commission finds no merits in the arguments made by FCEL regarding non – filing of the notice.

14. The fact of approval of the combination on assessment that it does not raise any 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.

15. 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 which comes out to be [….]. However, considering the totality of the facts of the case and explanation given by the Parties, the Commission deemed it appropriate to impose a penalty of INR 10,00,000/- (INR ten lakh only) on FCEL.

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

17. The Secretary is directed to communicate to FCEL accordingly.