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## COMPETITION COMMISSION OF INDIA

2<sup>nd</sup> May 2022

### Proceedings against Allcargo Logistics Limited under Section 43A of the Competition Act, 2002

#### CORAM:

Mr. Ashok Kumar Gupta

Chairperson

Ms. Sangeeta Verma

Member

Mr. Bhagwant Singh Bishnoi

Member

#### Appearances

For Allcargo Logistics Limited : Mr. Gopal Jain, Ld. Sr. Advocate, Ms. Nandini Gore, Advocate, Ms. Neha Khandelwal, Advocate, Mr. Kaiwan Kalyaniwalla, Authorized Representative, Ms. Shweta Kesarkar, Authorized Representative.

#### ORDER UNDER SECTIONS 43A OF THE COMPETITION ACT, 2002

1. This Order shall dispose of the proceedings under Section 43A of the Competition Act, 2002 (**Act**) against Allcargo Logistics Limited (**Allcargo/Acquirer**) regarding acquisition of 46.86% of the equity share capital in GATI Ltd. (**GATI/Target**).

#### **Background**

2. The Commission had observed from the information available in the public domain that Allcargo had acquired 46.86% of the equity share capital of GATI without giving a notice



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- to the Commission in terms of Section 6(2) of the Act. On 30<sup>th</sup> December 2020, the Commission issued a letter to Allcargo initiating an inquiry under Section 20(1) of the Act in relation to acquisition of shares of GATI and directed it to furnish certain details regarding the said transaction.
3. Allcargo, in its response dated 29<sup>th</sup> January 2021, *inter alia*, confirmed the acquisition and explained that the transaction was not notified to the Commission, because the same was considered to be covered by the exemption set forth in the Ministry of Corporate Affairs' Notification No. S.O.988 (E) dated 27<sup>th</sup> March 2017 (**Target Exemption**).
  4. However, upon examination of the submissions of Allcargo, it was observed that Allcargo had considered the assets and turnover of only the target on a standalone basis and not the target group, as required in terms of the definition of 'enterprise' in the Act. It is pertinent to note that, in Section 2(h) of the Act, 'enterprise' is defined as: "*a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relating to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.*"
  5. Thus, based on the above definition, it was found that Allcargo ought to have considered the target 'enterprise' as 'target consolidated with its subsidiaries' and not on a standalone basis. It was observed that if the target 'enterprise' was considered to be 'target consolidated with its subsidiaries', the Target Exemption may not be applicable.
  6. Since, upon examination of the information available on record, the information was not found sufficient for taking a definitive view, the Commission, *vide* letter dated 14<sup>th</sup> July 2021, sought further details from Allcargo, such as: (i) audited consolidated assets and



turnover of the target, (ii) turnover of the target and its group entities operating in India, and (iii) the rights acquired by Allcargo in GATI. The response to the same was received on 27<sup>th</sup> July 2021.

### **Initiation of proceedings and issue of SCN**

7. The Commission, in its meeting held on 25<sup>th</sup> October 2021, considered the material on record, including Allcargo's submissions dated 29<sup>th</sup> January 2021 and 27<sup>th</sup> July 2021, and noted that, upon inclusion of the subsidiaries of the Target, the exemption in the form of Target Exemption would not be available.
8. Thus, the Commission took the *prima facie* view that the above acquisition is a combination and that the Target Exemption was not applicable to the same. Consequently, the notification of the said acquisition was mandatory. Thus, Allcargo ought to have given a notice to the Commission in terms of Section 6(2) of the Act read with Regulation 5 of the Competition Commission of India (Procedure in Regard to the Transaction of Business relating to Commission) Regulations, 2011 (**Combination Regulations, 2011**). However, Allcargo failed to comply with such requirement.
9. In view of the above, the Commission decided issue a show cause notice *vide* its letter dated 9<sup>th</sup> November 2021 to Allcargo under Section 20(1) and 43A of the Act read with Regulation 8(2) of the Combination Regulations, 2011 and Regulation 48 of the Competition Commission of India (General) Regulations, 2009 (**CCI General Regulations, 2009**) to explain, in writing, why Allcargo should not be found in contravention of the obligation contained in Section 6(2) of the Act and why no penalty in terms of Section 43A of the Act shall be imposed. Allcargo was also asked to explain in writing why the Commission should not direct Allcargo to give notice in terms of Regulation 8(2) of the Combination Regulations.
10. On 6<sup>th</sup> January 2022, Allcargo submitted its response after grant of extension by the Commission (**Response-I**). The Commission, in its meeting held on 20<sup>th</sup> January 2022, considered Response-I received from Allcargo. The Commission also considered Allcargo's request for grant of oral hearing and decided to allow the same. Accordingly, Allcargo was directed to appear before the Commission for hearing on 9<sup>th</sup> February 2022.



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11. On 9<sup>th</sup> February 2022, the Commission heard Allcargo at length. The Commission further allowed Allcargo to file its written submissions, which were received on 9<sup>th</sup> February 2022.

### **Brief Description of the Parties**

12. Allcargo is a public listed company incorporated in India. The principal activity of Allcargo along with its subsidiaries is providing integrated logistics solutions. It offers specialised logistics services across four business segments: Multimodal Transport Operations, Container Freight Station Operations, Project and Engineering Solutions, and Warehousing & Logistics Park.
13. GATI is a public listed company incorporated in India, primarily engaged, directly or indirectly through its subsidiaries, in the business of express distribution (surface, air and rail parcel), supply chain management solutions, value added transportation solutions, e-commerce logistics, and operation of fuel stations. In the express business, it involves the transport of goods for domestic requirements between two locations within India.

### **Submissions of Allcargo**

14. The contentions and arguments of Allcargo can be broadly summarised as under:
- (a) That the acquisition has no “Appreciable Adverse Effect” on Competition, or prejudice the interests of consumers, or affect freedom of trade in Indian markets.
  - (b) That the acquisition is exempted from the provisions of Section 5 and 6 of the Act, as it is covered by the Target Exemption.
  - (c) That the services provided by Allcargo and GATI in the logistics sector are distinct and exclusive of each other; while Allcargo is engaged in heavyweight logistics services, GATI is engaged in express, door-to-door, and lightweight logistics services.
  - (d) That Allcargo and GATI continue to provide independent services in different market segments.



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- (e) That the acquisition has not resulted in Allcargo gaining dominant position in the relevant market.
- (f) That there is the presence of other competitors for both GATI and Allcargo.
- (g) That the technical or venial breach of provisions of the Act was committed from a *bona fide* belief that benefit of Target Exemption was available to Allcargo in relation to the said acquisition, and Allcargo was exempted from compliance under Section 6 of the Act.
- (h) That Allcargo has neither acted deliberately in defiance of law nor acted in conscious disregard of its obligation. Thus, Allcargo should not be subjected to penalty for a technical error under a *bona fide* belief that does not result breach of the objective/preamble of the Act.

### **Commission's Analysis and Finding**

15. The Commission has considered the submissions of Allcargo as well as heard the arguments advanced by the learned counsel. It is observed that prior to acquisition of 46.86% stake in GATI by Allcargo, there was an obligation upon Allcargo to file a notice under Section 6(2) of the Act. However, it completed the purchase of shares resulting in acquisition of 46.86% in GATI without filing any notice with the Commission. Therefore, the issue for determination in relation to the SCN issued to Allcargo is: "Whether Allcargo, by acquisition of shares of GATI without filing a notice under Section 6(2) of the Act, has contravened the provisions of Section 6(2A) of the Act and is, hence, liable for penalty under Section 43A of the Act".
16. Section 5 of the Act states that 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 the combining parties exceed the thresholds set in the Act. The thresholds are specified in the Act in terms of assets or turnover in India and abroad. Further, Section 6(2) of the Act provides that the parties proposing to enter into a combination shall give a notice to the Commission and, as per Section 6(2A) of the Act, "*No combination shall come into effect until two hundred and ten days have passed from*



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*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.”*

17. Based on the submissions, it is noted that Allcargo had entered into Share Purchase Agreements and Share Subscription Agreement with GATI on 5<sup>th</sup> December 2019 and completed the acquisition of 46.86% shares (including through market purchases/open offer during said period) of GATI by April 2020, without filing notice with the Commission. In its defence, Allcargo has submitted that it was under a *bona fide* belief that the benefit of Target Exemption was available to it in relation to the said acquisition. However, it appears that Allcargo had made an erroneous assumption, because if it had considered the assets and turnover of the target group on a consolidated basis instead of standalone as required under the Act, it would have been clear that the Target Exemption was not available for the said transaction.
18. Further, in relation to Allcargo’s submission that the said transaction did not result in Appreciable Adverse Effect on Competition (AAEC) in India, it is pertinent to note that the mandatory regime for notifying a proposed combination to the Commission is applicable, irrespective of whether the combination causes any AAEC in India or not. In this regard, the Commission, in its order relating to penalty proceedings under Section 43A of the Act against Intellect Design Arena Limited, has already observed: “.... *the Act clearly provides, irrespective of whether there is any appreciable adverse effect on Competition in India or not, there is mandatory regime for notifying a combination to the Commission.*”
19. In view of the foregoing, it emerges that Allcargo, by acquisition of shares of GATI without filing a notice with the Commission in terms of Section 6(2) of the Act prior to acquisition, has contravened the provisions of Section 6(2A) of the Act, and hence, is liable to a penalty under Section 43A of the Act, which 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.”*



20. It is to be noted that Section 43A of the Act prescribes the extent of penalty that can be levied for failure to file notice; however, the Commission has sufficient discretion to consider the conduct of the parties and circumstances of the case to arrive at an appropriate amount of penalty.
21. In the instant matter, the Commission finds that the conduct of Allcargo, whereby it extended cooperation during the inquiry and supplied requisite material/documents in response to the information requirement of the Commission, can be considered as mitigating factors. While the Commission acknowledges that Allcargo has been cooperative through the course of the proceedings, it cannot be exculpated of the statutory obligation to file notice with the Commission prior to the consummation of the proposed combination.
22. Thus, considering the facts and circumstances of the case and the conduct of Allcargo, the Commission decides to take a lenient view and imposes a penalty of INR Twenty Lakhs (INR 20,00,000/-) on Allcargo. Allcargo shall pay the penalty within 60 days from the date of receipt of this order
23. The Secretary is directed to inform Allcargo, accordingly.