COMPETITION COMMISSION OF INDIA

(Combination Registration No. C-2015/06/283)

Fair Competition
For Greater Good

30.12.2015

Order u/s 43A of the Competition Act, 2002 ("Act") in the notice given u/s 6(2) of the Act by:

(a) Johnson and Johnson Innovation, Inc. ('**JJDC**'),

(b) Ethicon Endo-surgery, Inc. ('**Ethicon**')and

(c) Google Inc. ('**Google**')

CORAM:

Mr. Sudhir Mital
Member

Mr. U. C. Nahta
Member

Mr. M. S. Sahoo
Member

Mr. G. P. Mittal
Member

Legal representative / Appearances: Mr. Amit Sibal, Sr. Advocate with Mr. Avinash Amarnath, Advocate, Vinod Dhall&tt&a, and Ms KamyaRajgopal, Advocate, for AZB & Partners.

1. On 5thJune 2015, the Competition Commission of India ("**Commission**") received a notice given under sub-section (2) of Section 6 of the Competition Act, 2002 ("**Act**")by JJDC, Ethicon, and Google.(JJDC, Ethicon, and Google are hereinafter collectively referred to as "**Parties**").

2. The combination relates to the formation of a greenfield joint venture ("**JV**"), namely Warren Robotics Inc., amongst the Parties, to carry out research and development in respect of robotic systems for surgical intervention. The combination involves the transfer of certain assets (including intellectual property and related assets) from Google and Ethicon to the JV and meets the notification thresholds prescribed under Section 5(a) of the Act read with sub-regulation (9) of Regulation 5 of the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 ("**Combination Regulations**").

3. On 10th July 2015, the Commission considered and assessed the proposed combination and approved the same under sub-section (1) of Section 31 of the Act. While considering the combination in its meeting held on 10th July 2015, the Commission also noted that the notice was filed after expiry of the statutory time period of 30 (thirty) days provided in Section 6(2) of the Act. With regards to the delay, it was noted that the Parties had entered into a Share Purchase Agreement dated 24th March 2015 ("**SPA 1**") which was subsequently modified by an amendment dated 15th May 2015 ("**SPA 2**"). Accordingly, the notice was given on 5th June 2015, after a delay of 43 days. It was, therefore, noted that the notice was filed after expiry of the statutory time period of 30 (thirty) days provided in Section 6(2) of the Act.

4. In view of the foregoing and information on record, the Commission, in its meeting held on 30th July 2015, directed that penalty proceedings under Section 43A of the Act be initiated against the Parties. Accordingly, a show cause notice ("**SCN**") was issued to the Parties under Regulation 48 of the Competition Commission of India (General) Regulations, 2009 ("**General Regulations**"), read with Section 43A of the Act, on23rd July 2015, requiring them to show cause, in writing, within 15 days of receipt of the same, as to why penalty, in terms of Section 43A of the Act, should not be imposed on them. The response to the SCN ("**Response**") was submitted by the Parties on7th August 2015.

5. In its meeting held on 21st September 2015, the Commission considered the Response and decided to grant an oral hearing to the Parties. Accordingly, the Parties presented their case before the Commission on 20th October 2015. The Commission further deliberated on the

written and oral submissions of the Parties in its meeting held on 30th December 2015. The Commission noted that the parties have made, *inter alia*, the following broad submissions:

a. The relevant "*agreement or other document*" for the purposes of sub-section (2) of Section 6 of the Act in this case is SPA 2, executed on15th May 2015. This final agreement, i.e., SPA 2, was based on SPA 1, which was subject to continuing negotiations between the Parties with respect to, in particular, matters relating to merger filings. On 24th March 2015, the Parties had foreseen that further negotiations would be necessary. These continued negotiations were to be undertaken to ensure compliance with applicable antitrust laws, including the Act; and

b. 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 triggering the relevant period. Given that this discretion is in the hands of the Parties, it would not be rational to interpret the provisions of sub-section (2) of Section 6 of the Act to consider an agreement which does not specify the conditions that must be fulfilled before a transaction is complete (nor the rights and obligations of the Parties to the agreement with respect to ensuring that these conditions are satisfied) as a binding document under sub-section (2) of Section 6 of the Act. Accordingly, such an agreement is incomplete and not "definitive" so as to serve as the basis for a notice.

6. The Commission observed that:

a. Clause 6.13 of SPA 1 provides that "[*t*]*his Agreement (including exhibits hereto), the Certificate of Incorporation and other Transaction Agreements constitute the full and entire understanding and agreement between the Parties with respect to subject matter hereof*…". As a result, SPA 1 constituted the definitive agreement between the Parties for the purchase of shares in the JV;

b. It is also noted that SPA 2, which amended SPA 1, is not a standalone agreement between the Parties and has, in fact, been referred to as "*Amendment No. 1 to Stock Purchase Agreement*". Further, it may be noted that SPA 2 provides that "*any reference to the "date of the Agreement" shall, unless the context expressly requires otherwise, refer to March 24, 2015 and any reference to the date of this Letter shall*

refer to the date first set forth above. Except as expressly amended in Section 1 of this Letter, the Purchase Agreement shall apply, control and continue in full force and effect as originally constituted and is hereby ratified and affirmed by and/or on behalf of each of the Parties".Thus, the date of the relevant agreement for acquisition of shares of the JV is evidently the date of SPA 1;

c. Based on the above, it is observed that SPA 2 was merely an amendment to the SPA 1 and did not constitute an agreement for acquisition of shares, voting rights, control or assets, as provided under sub-section (2) of Section 6 of the Act. This is also evidenced by the content of SPA 2, which amended only the following limited clauses of SPA 1, *viz.*, (a) the jurisdictions in which notification is required to be filed; (b) extension of the "Outside Date", i.e., the long stop date for Closing; and (c) reverse termination fee payable on termination of SPA 1. The provisions regarding share subscription, etc., as provided in the SPA 1 remain unchanged;

d. Based on the foregoing, it is observed that SPA 1, would be the agreement for acquisition in terms of sub-section (2) of Section 6 of the Act and the notice ought to have been given by the Parties to the Commission within 30 days of execution of SPA 1. However, the notice was given by the Parties to the Commission only on 5thJune 2015, with a delay of 43 days; and

e. 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.

7. Thus, in view of the foregoing, the Commission observed that the Parties failed to give notice to the Commission within the time period of 30 days of execution of the agreement for acquisition, i.e., SPA1,under sub-section(2) of Section 6of 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 subsection(2) of section 6, the Commission shall impose on such person or enterprise a penalty which may extend to one percent of the total turnover or the assets, whichever is higher, of such a combination.*"

8. However, considering the fact that the Parties, notwithstanding the delay of around 43 days in giving notice, had voluntarily filed the notice with the Commission before giving effect to the combination, the Commission considered it appropriate to impose a nominal penalty of INR 5,00,000/- (INR Five Lakhs only) on the Parties. The Parties shall pay the penalty within sixty (60) days from the date of receipt of this order.

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