सत्यमेव जयते

Fair Competition
For Greater Good

COMPETITION COMMISSION OF INDIA

(Combination Registration No. C-2015/12/347)

16.08.2016

Order under Section 43A of the Competition Act, 2002 in relation to combination registration no. C-2015/12/347

Coram

Mr. S. L. Bunker
Member

Mr. Augustine Peter
Member

Mr. U. C. Nahta
Member

Mr. M. S. Sahoo
Member

Legal Representatives: Shri Raj Shekhar Rao, Shri Ram Kumar and Shri Avinash Amarnath.

1. On 4th December 2015, the Competition Commission of India (hereinafter referred to as the "**Commission**") received a notice from SRF Ltd. (**"Acquirer**") regarding its acquisition of pharma grade HFC 134a Fluorochemical propellants business (''**Relevant business**'') of E.I. Du Pont De Nemours and Company ("**DuPont**").

2. The combination was notified to the Commission after initiation of an inquiry under sub-section (1) of Section 20 of the Competition Act, 2002 ("**Act**") ("**Inquiry**"). (Hereinafter, Acquirer and DuPont shall together be referred to as the "**Parties**"). The Commission considered and approved the combination under sub-section (1) of section 31 of the Act on 4th February 2016. The said decision was taken without prejudice to any penalty which may be imposed or any prosecution which may be initiated against the Acquirer in accordance with the provision of the Act.

3. It has been noted that the Parties entered into a Commercial Assets Sale and IP License Agreement ("**Agreement")** on 31st December, 2014. In order to determine whether the transaction was a combination under the relevant provisions of the Act, a communication under sub-section (1) of Section 20 of the Act was issued to the Acquirer on 20th August 2015, the response to which was received on 30th October 2015, along with the requisite information and copies of the agreements pertaining to the combination. In its meeting held on 8th December 2015, the Commission noted the response submitted by Acquirer and observed that the combination meets the jurisdictional thresholds in terms of Section 5 of the Act. Accordingly, the said combination ought to have been notified to the Commission in terms of sub-section (2) of Section 6 of the Act, within the prescribed timelines. In the meantime, Acquirer filed the notice on 4th December 2015, before a direction was issued by the Commission in terms of sub-regulation (2) of Regulation 8 of the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011. ('**Combination Regulations**'). The Commission also observed that the closing of the transaction took place on the 31st December 2014.

4. In view of the foregoing, it *prima facie* appeared that the Acquirer not only failed to give the notice of the combination with in the time stipulated under sub-section (2) of Section 6 but also consummated the same before giving notice to the Commission, in contravention of sub-section (2) of section 6 read with sub-section (2A) of Section 6 of the Act. In its meeting held on 4th February 2016, the Commission, decided to initiate proceedings under Section 43A of the Act. Accordingly, a show cause notice ('**SCN**') was issued to the Acquirer 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, within 15 days of the receipt of such communication as to why penalty, in terms of Section 43A of the Act, should not be imposed on Acquirer for failure to file a notice in respect of the combination under sub-section (2) of Section 6 of the Act. The Acquirer submitted the response to the SCN with the Commission on 11th March 2016. ("**Response to SCN**"). In the said Response to SCN, Acquirer also requested for a personal hearing to explain its position in the matter.

5. The Commission, in its meeting held on 27th July 2016, considered the Response to SCN and decided to grant a hearing to Acquirer to present its case. Accordingly, the authorized representatives of the Acquirer presented their case on 16th August 2016.

6. Following submission, written as well as oral, have been put forth by the Acquirer:

6.1 Acquirer was under a *bona fide* belief that assets and turnover of the Relevant business to be considered for purpose of calculating thresholds ('**deminimis thresholds**'), prescribed by the notification S.O. 482(E) dated 4th March 2011 ('**deminimis notification**') issued by the Ministry of Corporate Affairs, Government of India ('**MCA, GoI**'), and not the entire assets and turnover of the DuPont. The total turnover of the Relevant business being acquired in India was below the deminimis thresholds. It was also submitted that combination also did not meet the revised deminimis thresholds issued by MCA GoI vide Notification S.O. 674 (E) dated 4th March 2016. Therefore, the combination was not reportable to the Commission.

6.2 Despite the *bona fide* understanding that the combination was not reportable, pursuant to the Commission's letter dated 20th August 2015, legal advice was tendered to the Acquirer that the Commission might consider the transaction to be a notifiable combination. Accordingly, in the interests of full disclosure and to establish the Parties' *bona fide* intentions to comply with the Act, the notice was filed voluntarily and even prior to the Commission arriving at any conclusion with respect to the reportability of the transaction. Further, there has been no attempt at any stage to evade the Commission's jurisdiction.

6.3 The Commission approved the combination unconditionally, thereby affirming that the combination had no effect on competition in India considering that the transaction was of miniscule value.

6.4 The Parties have been transparent throughout the proceedings and duly disclosed all the relevant documents to the Commission and there was no effort whatsoever to conceal the combination or any related information from the Commission.

6.5 The transaction did not require filing in the United States of America ('**USA**') shows that it is a small transaction with no effect on competition.

7. In view of the above submissions, the Acquirer has submitted that as the transaction was not reportable, no penalty be levied on it. It has also been submitted that notwithstanding the above, if a penalty is imposed, such penalty should only be nominal as the combination had no effect in the relevant market in India and the Parties had a bona fide belief that the transaction did not require a notification. Further, only the assets and turnover of the Relevant business being acquired be taken into consideration for the purposes of penalty to be levied, if any and the same would also be in accordance with the ruling of the Competition Appellate Tribunal ("**COMPAT**") on the aspect of turnover which should be considered for the purposes of imposing penalty. In this regard, Acquirer has quoted the extract of *Hiranandani Hospital v. CCI and Ramakant Kini, wherein the COMPAT observed that: "At the cost of repetition, it deserves to be emphasised that the appellant has been providing multiple healthcare services, maternity service being one of them and stem cell banking which is being provided by a third party (Cryobanks), can at best be considered as a small part of the maternity services provided to those who are desirous of availing such services. Therefore, even if the finding of the majority of the Commission that the agreement entered into between the appellant and Cryobanks is violative of Section 3(1) of the Act is to be upheld, the turnover of the appellant with reference to stem cell banking services only could be taken into consideration for the purpose of imposing penalty and not the turnover with reference to other services or income derived from other sources".*

8. The Commission has examined and analysed the submissions of the Acquirer and observes as under:

8.1 Section 5 (a) of the Act covers the transactions relating to the acquisition of assets, shares and voting rights of an enterprise and lays down in very clear and unambiguous terms that the parties to an acquisition, being the acquirer and the enterprise, whose control, shares, voting rights or assets have been acquired or are

being acquired jointly have either, in India, the assets of the value of more than rupees two thousand crores or turnover more than rupees six thousand crores.

8.2 Moreover, deminimis notification also states, in very clear terms, that assets and turnover of the enterprise *whose control, shares, voting rights or assets are being acquired*, be considered for the purposes of thresholds, as set out in deminimis notification, and not of the value of assets and turnover of the segment / particular business, being acquired. The deminimis notification[1] reads as under:

"In exercise of the powers conferred by clause (a) of Section 54 of the Act, the Central Government, in public interest, hereby exempts an enterprise, whose control, shares, voting rights or assets are being acquired has either assets of the value of not more than INR 250 crore in India or turnover of not more than INR 750 crore in India from the provisions of Section 5 of the said Act for a period of five years"

8.3 The term "*enterprise*", as defined under clause (h) of Section 2 of the Act, means "*a person or a department of government…*" Further, the term "*person*" in terms of clause (l) of Section 2 of the Act has been defined as follows:

"person" includes –
(i) an individual;

(ii) a Hindu undivided family;

(iii) a company

(iv) a firm;

(v) an association of persons or a body of individuals, whether incorporated or not, in India or outside India; or

(vi) any corporation established by or under any Central, State or Provincial Act or a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956);

(vii) any body corporate incorporated by or under the laws of a country outside India;

(viii) co-operative society registered under any law relating to cooperative societies;

[1] *Government of India vide Notification S.O. 674 (E) dated 4th March 2016, revised deminimis thresholds to INR 1000 crores for turnover in India and INR 350 crore for assets in India.*

(ix) a local authority;

(x) every artificial juridical person, not falling within any of the preceding sub-clauses".

8.4 A plain reading of all the categories covered under the definition of a "*person*" suggests that only an entity which has separate legal personality is covered under the term "*person*". A business division of an enterprise, such as Relevant business, is not an artificial juridical person as it does not have a distinct legal personality from that of the enterprise which houses the business division/segment. Thus, a business division/segment is neither covered in any of the sub-clauses from (i) to (ix) as mentioned above nor is covered under sub-clause (x) as it does not have a separate legal/juristic personality.

8.5 DuPont is a company, incorporated under the laws of USA and qualifies as a "*person*" under sub-clause (vii) of clause (l) of Section 2 of the Act. It cannot be accepted that Relevant business, which is a part of DuPont, is also separately covered under the definition of "*person*".

8.6 For reasons discussed above, the Commission is of the considered view that the business divisions and/or units do not qualify as person or enterprise. Accordingly, Relevant business, being one of the several businesses of DuPont is not a person and therefore, not an enterprise. Thus, the argument that the assets and turnover of Relevant business being acquired be considered as an "enterprise" for the purpose of exemption on account of deminimis notification, is incorrect and deserves to be rejected.

8.7 As the deminimis notification is also to be reckoned at the enterprises level, the assets and turnover of DuPont in India are to be considered. It is noted from the information provided in the notice filed, that value of assets and turnover of DuPont for the financial year preceding the date of execution of Agreement exceeds the value of assets and turnover set out in the deminimis notification.

8.8 In view of the above, the Commission holds that the combination was a reportable transaction.

8.9 The Acquirer's arguments that transaction is of small value and there was no effect on competition in India, cannot be accepted as a ground for not filing a combination meeting thresholds prescribed under section 5 of the Act and exceeding the deminimis thresholds. Further, the Act casts a duty on the Parties entering into a combination to report the same by following procedure prescribed under relevant provisions of the Act and Combination Regulations.

8.10 With regards to the contention of the Acquirer that the combination was notified voluntarily and even prior to the Commission arriving at any conclusion, it is noted that combination was reported only after an inquiry under Section 20 (1) was initiated by the Commission.

9. In view of the foregoing, the Commission is of the opinion that the combination meets the thresholds prescribed under Section 5 of the Act and therefore, the acquisition of Relevant business by Acquirer was notifiable to the Commission in terms of the provision of sub-section (2) of Section 6 of the Act. Further, the said combination is not covered by the deminimis notification. In this regard, it is noted that 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".

10. The Commission also noted that the parties had given effect to the combination before reporting the same to the Commission. In this regard, 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".

11. Accordingly, the Acquirer not only failed to give notice to the Commission in accordance with the requirements of sub-section (2) of Section 6 of the Act but also consummated the same, thereby infringing the above mentioned provisions of the Act and 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.*"

12. With regards to the submissions of Acquirer that in case the Commission decides to levy penalty, it should be levied on the basis of assets and turnover of Relevant business, it is observed that Section 43 A of the Act leaves no ambiguity in specifying that the penalty be levied on total turnover or assets of the combination, whichever is higher and not on turnover or assets of the Relevant business.

13. As per the details provided, the value of their worldwide assets and turnover for the year immediately preceding the year of Agreement, are as follows:

Name of the Parties	Assets	Turnover
	Worldwide (in USD million)	**Worldwide (in USD million)**
SRF Ltd (for financial year 2013-14)	891	652
DuPont	51499	35734
Total	52,390	36,386

Source: For SRF Ltd., information as given by Acquirer and for DuPont as available in its Form 10-K, for year ending 2013.

14. Accordingly, in terms of Section 43A of the Act, the Commission can levy a maximum penalty of one per cent of the combined value of worldwide assets of the Parties i.e.

USD 52,390 million (approximately INR 3,40,000 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 has considered totality of factors while determining the quantum of penalty. In view of the foregoing, applying the principles of proportionality, the Commission considers it appropriate to impose a penalty of INR 1,000,000/- (INR one million only) on the Acquirer, which is approximately 0.00003 per cent of the combined value of worldwide assets of the Parties.

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

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