14.09.2016

Notice given under Section 6(2) of the Competition Act, 2002 ("Act") by Hindustan Colas Private Limited: Combination Regn. No. C-2015/08/299

Order under Section 43A of the Act

1. On 21.08.2015, the Competition Commission of India (hereinafter referred to as the **"Commission"**) received a notice, under Section 6(2) of the Act, filed by Hindustan Colas Private Limited ("**Hindustan Colas**"/ "**Acquirer**"). The notice of combination was given pursuant to execution of the Sale and Purchase Agreement ("**SPA**") between Hindustan Colas and Shell India Markets Private Limited ("**SIMPL**") on 23.07.2015 (hereinafter Hindustan Colas and SIMPL are collectively referred to as the "**Parties**"). The combination relates to acquisition by Hindustan Colas of the Bitumen Business Plant (engaged in manufacturing of bitumen emulsion and modified bitumen products) of SIMPL located in Uluberia district of West Bengal ("**Combination**").

2. On 18.02.2016, the Commission considered and assessed the Combination and approved the same under Section 31(1) of the Act.

Proceedings under Section 43A of the Act

3. In terms of Section 6(2) of the Act, an enterprise, which proposes to enter into a combination, is required to give a notice to the Commission, disclosing the details of the proposed combination, within thirty days of execution of any agreement or other document for acquisition. Further, as per Section 6(2A) of the Act, no combination shall come into effect until 210 days have passed from the day on which the notice has been given to the Commission under Section 6(2) or the Commission has passed orders under Section 31 of the Act, whichever is earlier.

4. The Commission observed that the Acquirer had paid a sum of Rs. 4,00,00,000/- (*Rupees Four Crores Only*) to SIMPL on the date of signing of the SPA and that the balance amount was to

be paid on the date of completion of the Combination. It, therefore, appeared that the Parties had part-consummated the Combination even before a notice was given to the Commission under Section 6(2) of the Act. Accordingly, a show cause notice ("**SCN**") was issued on 27.04.2016 to the Acquirer under Section 43A of the Act read with Regulation 48 of the Competition Commission of India (General) Regulations, 2009 ("**General Regulations**"). The SCN required the Acquirer 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 it for failure to file notice for the Combination in accordance with Section 6(2) of the Act and consummating a part of the Combination before the expiry of time period stipulated under Section 6(2A) of the Act. The Acquirer filed its reply to the SCN on 12.05.2016 ("**Response to SCN**") along with a request for oral hearing, in terms of Regulation 48 of the General Regulations.

5. In its meeting held on 13.06.2016, the Commission considered the Response to SCN and decided to grant an oral hearing to the Acquirer. Accordingly, the Acquirer presented its case before the Commission on 12.07.2016 followed by written submission dated 18.07.2016. Following submissions were made by the Acquirer:

5.1 Hindustan Colas had complied with Section 6(2) of the Act by filing notice within the prescribed time limit of 30 days from the date of the SPA.

5.2 The payment of Rs. 4 Crores was envisaged in the SPA as refundable deposit in good faith and not as pre-payment of consideration. In this regard, the Acquirer referred to clauses 4.2.1 and 4.4 of the SPA, which read as under:

Clause 4.2.1 of the SPA: *"The Consideration less Deposit, along with the other amounts listed in Clause 4.1above, shall be paid at Completion in immediately available cash funds through electronic funds transfer to the Seller's Account"*

Clause 4.4 of the SPA: *"The Deposit shall be repayable by Seller to the Purchaser within 10 days of occurrence of any of the following:*

(a) that this Agreement is terminated on or before 120 days from the date of this Agreement, as per Clause 3.6 above, on account of reasons solely attributable to

non-receipt of approval from Competition Commission of India and the consent to transfer from WBIDC, despite the best efforts of Purchaser .

(b) that this Agreement is terminated on or before Long Stop Date as per Clause 3.6 above, on account of reasons solely attributable to the Seller, in which case the Deposit shall be refunded together with interest on the Deposit at the Default Rate for the period commencing from the date of the Agreement".

It has been submitted that a harmonious reading of various clauses in the Agreement indicate that amount of Rs. 4 Crores paid by Hindustan Colas to SIMPL had to be refunded if the Commission's approval was not received. It is further submitted that in the event of grant of approval by the Commission, the same would have been adjusted against the consideration.

5.3 In this regard, reference has been made to 'Guidance for Analysis of Prior Consummation of Transaction' issued by Administrative Council for Economic Defense (CADE), Brazil issued in May 2015 ("**CADE Guidelines**") which lists certain instances which could be regarded as gun-jumping. In terms of the CADE guidelines, full or partial non-refundable payment of price / purchase consideration, except for (i) down payments commonly used in commercial transactions; (ii) and deposit or payment into an escrow account; or (iii) break-up fees, may be considered as gun jumping. It has been submitted that the aforesaid deposit is akin to a 'down payment' or alternatively a payment in an escrow account since it was refundable and therefore, based on the CADE guidance note, the same cannot be considered as gun-jumping.

5.4 The Acquirer submitted that the refundable deposit had not resulted into any benefit or control to Hindustan Colas other than showcasing its commitment to SIMPL towards the Combination. It has been submitted that there were other potential buyers competing for the same asset, it was felt necessary and commercially expedient to pay this deposit to demonstrate their earnestness in acquiring the asset.

5.5 The Acquirer has made reference to various clauses in the SPA and submitted that the Combination could have been consummated only after two prime approvals, i.e., one from the Commission and the other from West Bengal Industrial Infrastructure Development

Corporation ("**WBIIDC**"). It has been further submitted that the communication of approval of the Combination by the Commission was made on 19.02.2016 and pursuant to the same, the process for consummation of Combination was started and the same was completed on 07.03.2016.

5.6 In support of its submissions that the Combination was not consummated before the approval of the Commission, the Acquirer has submitted various documents including, inter-alia, (i) Transfer Note dated 07.03.2016 executed between the Parties; (ii) bank statement indicating payment of consideration less deposit on 05.03.2016; (iii) appointment letters dated 07.03.2016 given to employees of SIMPL; (iv) copies of applications dated 23.02.2016 for excise and registration and dated 02.03.2016 for sales tax registration; and (iv) copy of tripartite lease agreement dated 22.03.2016 executed between the Parties and WBIIDC.

5.7 Further, it has been submitted that no step was taken for integration of businesses before receiving approval from the Commission. The Acquirer has submitted that there was no exchange of commercially sensitive information or ceasing or marketing in competition with each other during the waiting period. It was also stated that in terms of Combination, customers of SIMPL were not assigned to Hindustan Colas which implies lack of possibility of Hindustan Colas being able to exercise influence on SIMPL by using their customer information. In support of the assertion that both the Parties were carrying on business as usual without any interference, the Acquirer submitted yearly sales volumes of SIMPL for the period 2013-2015 have been broadly consistent.

5.8 It has also been submitted that SIMPL had communicated with their customers introducing Hindustan Colas only after the approval was received from the Commission. The Acquirer submitted sample copies of communications made in this regard.

5.9 The Acquirer has made reference to some decisions of the Commission[1] wherein penalties have been imposed under Section 43A of the Act. It has been stated that in all the referred cases, the action of the parties based on which penalty has been levied can be termed as

[1]Combination Regn No.C-2013-05-122 (Notice given by Etihad Airways and Jet Airways; Combination Regn No. C-2014-02-153 (Notice given by Thomas Cook (India) Limited, Thomas Cook Insurance Services (India) Limited and Sterling Holiday Resorts (India) Limited); and Combination Regn No. C-2014-05-175 (Notice given by SCM Soilfert Limited).

strategic in nature and with intent to acquire control. The Acquirer has submitted that these two elements are not present in this case.

5.10 The Acquirer has also made a reference to a decision of the Hon'ble Supreme Court in the matter of M/s Hindustan Steel Ltd. V. State of Orissa[2]. In this case, Hon'ble Supreme Court held that *"An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation."* It has been stated that these elements are not present in this case.

5.11 The Acquirer submitted that they have demonstrated high sense of *bona fide* responsibility and made proper disclosures in the notice, including facts of total consideration and refundable deposit. The Acquirer further referred to various clauses of the SPA which provide for approval from the Commission as a primary requirement for consummation of the Combination and submitted that they had neither the intention to consummate nor had consummated the transaction prior to approval from the Commission. It has been submitted that the Acquirer exhibited promptness in responding to the queries from the Commission and were proactive in assisting the Commission. It has also been submitted that the Parties are committed to conduct business in accordance with applicable laws, rules and regulations and highest standards of business ethics and ethical conduct. Based on the aforesaid, the Acquirer requested the Commission to drop the penalty proceedings initiated under Section 43A of the Act.

6. With respect to the above-mentioned submissions of the Acquirer, the Commission observed as under:

6.1 Regarding compliance with Section 6(2) of the Act, the Commission observed that going by the interpretation of Section 6(2) of the Act as given by the Acquirer, the parties to a combination would be free to consummate a combination or any part thereof before giving notice or after giving notice but without waiting for the expiry of period specified under

[2](1969)2 SCC 627

Section 6(2A) of the Act as long as notice is filed within the time limit prescribed under Section 6(2) of the Act. In this regard, the Commission observed that it had considered and decided on a similar issue in Section 43A proceedings against Baxalta Incorporated[3] ("**Baxalta case**"). The Commission, in the said case had observed that,

"…the words "proposes" and "proposed" used in sub-section (2) of Section 6 have to be read in the context of sub-section (2A) of Section 6 (which suspends the consummation of the proposed combination for the period stated therein). Accordingly, till the expiry of the 210 days from the date of filing of the notice or the Commission has passed an order under Section 31 of the Act, whichever is earlier, a combination should remain a proposed combination and parties to the combination should not give effect to the combination. If the parties to the combination are allowed to give effect to the proposed combination either before filing of the notice with the Commission or after filing of the notice but before the expiry of the period given in sub-section (2A) of Section 6 of the Act, then it will tantamount to violation of sub-section (2) of Section 6 of the Act.

6.2 The Hon'ble Competition Appellate Tribunal ("**COMPAT**"), while adjudicating the issue relating to ex-ante nature of notification under Section 6(2) of the Act in an appeal filed in relation to an order passed, under Section 43A of the Act, by the Commission in SCM Soilfert Limited and Deepak Fertilizers and Petrochemicals Corporation Limited[4] ("**SCM Case**") has observed, *"The ex ante nature of notification under Section 6(2) is buttressed by a reading of sec. 6(2A) which deliberately used the phrase "no combination shall come into effect" until 210 days from date of notice, or passing of order under Sec. 31."*

6.3 Further, the Hon'ble COMPAT in the SCM Case also pointed out why ex-ante notification is critical to the regulation of combinations. It observed, *"It is essential that the Commission receive prior / ex-ante Notification of proposed combinations in order for it to effectively prevent anti-competitive acquisitions and mergers. A contrary reading of the Section so as to permit ex post facto notification would render the same nugatory.* ***Unless the Commission has a chance to examine the anti-competitive effects of the proposed combination before it is***

[3] Baxalta Incorporated, Combination Regn. No. C-2015-07-297, Order under Section 43A of the Act dated 08.03.2016
[4] Appeal No. 59/2015, COMPAT Order dated 30.08.2016

consummated, it will lead to a scenario where an anti-competitive acquisition has already been given effect to thereby making unraveling of the transaction complex, or in some cases impossible *where the acquisition of shares was done from the open market, as the sellers of the shares in such cases are anonymous and the shares" (emphasis added)*

6.4 Based on the aforesaid observations of the Commission in Baxalta case and Hon'ble COMPAT in SCM Case, it is implied that a combined reading of standstill obligations of the parties to a combination, as envisaged under Section 6(2) and 6(2A) of the Act, is considered as the cornerstone of ex-ante combination regulation.

6.5 Further, it is important to note that consummating a part of a combination, before filing notice or after filing notice but before the expiry of period specified under Section 6(2A) of the Act, may, in substance, have impact similar to consummation of combination itself. Therefore, the observations regarding ex-ante notification requirement apply both to consummation of a proposed combination or any part thereof.

6.6 In view of the aforesaid, the Commission is of the considered view that submissions of the Acquirer that it had complied with Section 6(2) of the Act by filing notice within the prescribed time limit of 30 days from the date of the SPA are not tenable. The Commission, therefore, proceeded with examination of the issue of payment of part consideration before filing of notice for contravention of provisions of Section 6(2) of the Act.

6.7 The Commission noted the submissions of the Acquirer that the payment was made as refundable deposit in good faith and not as pre-payment of consideration and references made to clauses 4.2.1 and 4.4 of the SPA. In this regard, the Commission observed that the submissions of the Acquirer are self-contradictory. While it is stated that the payment was not envisaged to be made as pre-payment of consideration, the clause referred by the Acquirer points otherwise. Clause 4.2.1 referred by the Acquirer envisages payment of "Consideration less Deposit" at the time of completion, which clearly implies that the said deposit was actually payment of part consideration and not merely a refundable deposit made in good faith.

6.8 The Acquirer made reference to the CADE Guidelines and stated that the payment made by it is refundable in nature and similar to a down payment or a payment into an escrow account and

exempt from the gun-jumping conduct as laid down in CADE Guidelines. The Commission, based on limited information available in public domain in respect of the CADE Guidelines, noted that the CADE Guidelines have been issued in May 2015 and attempt to provide clarity on issues such as (i) definition and characterisation of gun jumping; (ii) the procedures that can be adopted to mitigate the risks of an infringement; and (iii) penalties applicable to gun jumping.

6.9 The Commission observed that the CADE Guidelines referred by the Acquirer, while making a distinction between refundable and non-refundable payments, also recognize pre-payment of price as gun jumping, The Commission observed that while the distinction between refundable and non-refundable may have some merit in assessing the likelihood of reversion to the status quo ante in form, it may not be relevant from the perspective of potential competition distortions. The Commission noted that pre-payment of price (whether refundable/non-refundable) may have a number of competition distorting effects viz., (i) it may lead to a strategic advantage for the Acquirer; (ii) it may reduce the incentive and will of 'target' to compete; and (iii) it may become a reason/basis to access the confidential information of the 'target'. On an overall basis, it may be said that pre-payment of consideration may have the impact of creating a tacit collusion which may cause an adverse effect on competition even before consummation of the combination. Thus, the Commission is of the opinion that what is important is pre-payment of consideration and solely the fact of the same being refundable or otherwise is not relevant.

6.10 The Acquirer has also submitted that the payment made by it is equivalent to a 'down payment' or a payment in an 'escrow account'. In this regard, the Commission noted that 'down payment' is generally referred in context of commercial transactions in ordinary course of business and not in context of purchase/sale of business itself. As regards the payment being equivalent to money held in escrow account, the Commission observed that as the payment was made to SIMPL directly, there is no question of it being equivalent to money held in escrow account. Furthermore, Hon'ble COMPAT in SCM Case, on the issue of creation of escrow account and holding shares in an escrow account observed

"The creation of an escrow account and the covenant by the Appellants of their own volition to abstain from exercising the voting rights, do not eliminate the statutory requirement of the

prior notice. Therefore, we agree with the Respondent that the notification under section 6(2) of the Act has to be ex-ante."

The observations of COMPAT also point that the standstill obligations envisaged under Section 6(2) and 6(2A) are sacrosanct and any action on the part of the parties to a combination against the same attracts penalty under Section 43A of the Act. In view of the aforesaid, submissions of the Acquirer as regards payment being equivalent to a 'down payment' or 'payment in an escrow account' are not material.

6.11 The Acquirer further submitted that the refundable deposit had not resulted into any benefits or control to Hindustan Colas other than showcasing their commitment to SIMPL towards the Combination. It has also been submitted that there were other potential buyers competing for the same asset, it was felt necessary and commercially expedient to pay this deposit to demonstrate their earnestness in acquiring the asset. In this regard, as noted above, this type of arrangement is potentially likely to facilitate tacit collusion which is considered to be a worst form of collusion and therefore cannot be allowed. The Act mandates the Commission to examine combinations ex-ante and therefore the issues such as whether the parties actually benefitted or not from the impugned conduct or whether there were any commercial exigencies behind a particular conduct may not be relevant to the determination of provisions of Section 6(2) and 6(2A) of the Act.

6.12 The Acquirer has made references to suggest that the Combination was not consummated and no steps had been taken to integrate the businesses before the approval of the Commission. In this regard, the Commission observed that it has never been alleged that the entire Combination has been consummated, what was alleged was that pre-payment of consideration has the effect of consummating a part of the Combination before the approval of the Commission. Thus, the submissions of the Acquirer on this aspect are not considered as relevant.

6.13 The Commission also noted the submissions of the Acquirer that in the past, penalty has been levied in cases where the actions of the parties can be termed as strategic in nature and had intent to acquire control. In this regard, the Commission observed that gun jumping takes many forms and pre-payment of consideration being one such form, has the potential to distort the

competition dynamics of the markets as brought out in para 6.9 above. Considering that this is the first case of pre-payment of consideration and the Commission has deliberated on the relevant factors and elaborated the principles underlying its approach, submissions of the Acquirer regarding past decisions are not considered as relevant.

6.14 As regards the issue of imposition of penalty, the Commission noted the submissions made by the Acquirer and its reference to the Hon'ble Supreme Court decision in M/s Hindustan Steel Ltd. V. State of Orissa. The Commission observed that case referred by the Acquirer relates to the state sales tax proceedings and importing a legal principle from a completely different law with different mandate and scope is not appropriate. In fact, Hon'ble COMPAT in SCM case, observed, in response to the same case cited by appellants, that this case is inapplicable in cases relating to imposition of civil liabilities.

6.15 Thus, in view of the foregoing, the Commission observed that the payment of Rs. 4 crore by the Acquirer, by way of a refundable deposit amounts to pre-payment of consideration and consummating a part of the Combination before the approval of the same by the Commission 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 percent of the total turnover or the assets, whichever is higher, of such a combination."

7. As per the details provided by the Parties, the value of their worldwide assets and turnover for the year ending 31.12.2014, are as follows:

Party	Assets (Rs. Crore)	Turnover (Rs. Crore)
Hindustan Colas	300.50	887.85
SIMPL	2,925.40	4,770.30
Combined	**3,225.90**	**5,658.15**

8. 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 turnover of the Parties i.e. Rs.56.58 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, while determining the quantum of penalty, the Commission, apart from the size and scale of the Combination, considered the fact that the Acquirer had voluntarily filed the notice with the Commission along with disclosure that the aforesaid payment has been made to SIMPL and that the Acquirer has cooperated fully with the Commission. In view of the foregoing, the Commission considered it appropriate to impose a nominal penalty of INR 5,00,000/- (INR Five Lakhs only) on the Acquirer, which is approximately 0.0009 percent of the combined value of turnover of the Parties. The Acquirer 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 Acquirer accordingly.