COMPETITION COMMISSION OF INDIA

(Combination Registration No. C-2018/01/547**)**

30/07/2018

Notice given by Adani Transmission Limited

CORAM

Mr. Sudhir Mital
Member

Mr. Augustine Peter
Member

Mr. U. C. Nahta
Member

Mr. Justice G. P. Mittal
Member

Appearances during the oral hearing held on 14th June, 2018	:	Mr. Raj Shekhar Rao, Advocate along with Mr. Anshuman Sakle, Ms. Neelambera Sandeepan and Mr. Anandh Venkatramani, Advocates.

Order under Section 43A of the Competition Act, 2002

Background:

1. On 16th January, 2018, the Competition Commission of India (**Commission**) received a notice given by Adani Transmission Limited (**ATL**) under Section 6(2) of the Competition Act, 2002 (**Act**), regarding

its proposed acquisition of 100% of the equity shares of Reliance Electric Generation and Supply Limited (**ReGSL**) from Reliance Infrastructure Limited (**RInfra**). The notice was given pursuant to the execution of a Share Purchase Agreement on 21st December, 2017 (**SPA**), by and between ATL, REGSL and RInfra.

2. After the assessment of the combination, the Commission approved the said acquisition on 9th February, 2018 under Section 31(1) of the Act. The approval was granted without prejudice to the proceedings under Section 43A of the Act.

Section 43A Proceedings:

3. During the assessment of the combination, the Commission noted that certain provisions of SPA required ATL to advance loan to RInfra, even before the approval of Commission. The SPA further provided that ATL could adjust the loan advanced thereunder, as well as certain other earlier loans advanced by ATL to RInfra, against the consideration payable for the proposed acquisition. Based on these terms, the Commission was of the view that there exists a *prima facie* case of contravention of the standstill obligation contained in Section 6(2) of the Act read with Section 6(2A) of the Act, as the parties appeared to have partly consummated the combination even before the approval of the Commission. Therefore, it was decided to initiate proceedings under Section 43A of the Act.

4. Accordingly, a notice dated 7th March 2018, under Regulation 48 of the Competition Commission of India (General) Regulation (**General Regulations**) was issued to ATL to show cause, in writing, within fifteen (15) days of the receipt of the notice as to why penalty shall not be imposed upon it, in terms of Section 43A of the Act (**SCN**).

5. The relevant extract of SCN, based on which contravention was alleged, is reproduced as under:

> " *(a) Clause 2.A.2 of the SPA provides that the Acquirer will advance a loan amounting to INR 1,101.00 Crore out of which INR 101 Crore will be advanced on or about the Execution Date.*
>
> *(b) Clause 2A.3 of the SPA states that "the Purchaser at its sole discretion may exercise an option to set off such amounts repayable by the Seller to the Purchaser under the (i) loan agreement dated October 30, 2017, between the Purchaser and the Seller; (ii) loan advance referred to in Clause 2A.2 (loans referred to in (i) and (ii) collectively being referred to as "Total Loans") against the Share Sale Consideration, and making the remaining payment to the Seller, arrived at in terms of this Agreement".*
>
> *(c) Clause 2.1(ii) of the Amendment Agreement to the SPA (dated 21.12.2017) states that "Purchaser will advance an additional loan amounting to Rs 1101,00,00,000 (Indian Rupess One Thousand One Hundred and One Crore) to the Seller, out of which INR 101,00,00,000 (Indian Rupees One Hundred and One Crore) will be advanced on or about the Execution Date and for the balance amounts the timelines for funding will be mutually agreed between the Parties. It is agreed between the Parties that the Purchaser shall advance a further loan of INR 500,00,00,000 (Indian Rupees Five Hundred Crore) to the Seller on or about the date of the Amendment Agreement."*
>
> *(d) Further, Clause 7 of the SPA provides for adjustment in the purchase consideration of the "Total loan to the Seller to the extent outstanding on the Closing Date"."*

6. In response to the SCN, ATL filed its reply on 2nd April, 2018. The summary of the response is as under:

6.1. Since the issue largely relates to advancement of loan, it is clarified that ATL had entered into three different loan agreements with RInfra: (i) loan agreement dated 30th October 2017 for an amount of INR 1001/- crore; (ii) loan agreement dated 21st December, 2017 for an amount of INR 1001/- crore; and (iii) loan agreement dated 2nd January, 2018 for an amount of INR 500/- crore.

6.2. RInfra is not a party to the combination. ATL and REGSL are the parties to the combination in respect of which notice under Section 6(2) of the Act was given to the Commission. Therefore, advancement of loans to R-Infra, which is not a party to the combination should not fall within the ambit of a violation of Section 6(2A) of the Act.

6.3. Advancement of loans did not amount to payment of advance consideration for the purpose of the proposed transaction. The impugned loans embody the usual characteristics of an ordinary loan facility and were independently repayable. Loan was provided for a limited purpose of maintaining the financial and economic viability of R-Infra. Further, the impugned loans were only optionally adjustable against the consideration for the proposed acquisition as a mere safeguard mechanism for the lending enterprise. Thus, the loans cannot be regarded as advance consideration.

6.4. Advancement of loan does not amount to acquisition of control. Given that the loans were provided for a limited and for specified purpose of maintaining the financial viability of R-Infra, the same did not result in any form of control being acquired by ATL, prior to the approval of the Commission. Further, SPA sets out certain clauses, which ensure than no integration activity could take place

prior to the receipt of approval under the Act, which could be in violation of Section 6(2A) of the Act.

6.5. Further, actions and conduct of ATL were undertaken in good faith and without mala fide intention.

7. ATL further requested for a personal hearing before the Commission to present its case. The Commission allowed the request and heard ATL on 14th June, 2018.

8. During the hearing, the learned counsel appearing for ATL submitted that the decisional practice of the Commission has been certain in cases concerning pre-payment of consideration; and given the levels of penalty levied in those cases and that the relevant facts having been disclosed voluntarily by ATL in the notice given under Section 6(2) of the Act, penalty, if any, levied shall be in the between INR 5/- and INR 10/- lakhs.

Commission's Determination:

9. The Commission has gone into the material on record as well as heard ATL. The determination of the Commission is as under:

9.1. The crux of the issue is whether the advancement of loan to RInfra and adjustment of the same against the consideration payable for the proposed acquisition amount to a contravention of the standstill obligation contained in Section 6(2A) read with Section 6(2) of the Act.

9.2. Before getting into the merits of the contentions of ATL, it would be relevant to look into the relevant provision of the Act. It is

observed that the Act envisages *ex-ante* regulation of combinations. Section 6(1) of the Act prohibits combination that causes or is likely to cause appreciable adverse effect on combination and Section 6(2) of the Act obliges parties to the combination to give notice to the Commission in respect of their proposed combination. Further, Section 6(2A) of the Act provides that a combination notified to the Commission shall not come into effect for a period of 210 days from the date of notification or the approval of the Commission, whichever is earlier. For ease of reference, relevant extract of these provisions is reproduced below:

> "***Regulation of combinations***
>
> **6** *(1) No person or enterprise shall enter into a combination which causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India and such a combination shall be void.*
>
> *(2) Subject to the provisions contained in sub-section (1), any person or enterprise, who or which proposes to enter into a combination, shall give notice to the Commission, in the form as may be specified, and the fee which may be determined, by regulations, disclosing the details of the proposed combination, within thirty days of ….*
>
> *(2A) 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."*

9.3. In order to enforce the above provisions, including the *ex-ante* obligation of the parties thereunder, Section 43A was inserted into the Act, by way of an amendment in 2007, to empower the Commission to impose penalty in cases where parties fail to give

notice in terms of Section 6(2) of the Act. Section 43A of the Act reads as under:

> ***"Power to impose penalty for non-furnishing of information on combinations***
>
> ***43A***. *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."*

9.4. The Hon'ble Supreme Court of India, in *SCM Solifert Limited & Anr. v. Competition Commission of India* [Civil Appeal No(S). 10678 of 2016], had the occasion to deal with the scheme of ex-ante merger control under the Act. The relevant extracts are reproduced below:

> *19. The expression "proposes to enter into a combination" in section 6(2) and further details to be disclosed in the notice to the Commission are of the 'proposed combination' and the specific provisions contained in section 6(2A) of the Act provides that no combination shall come into effect until 210 days have passed from the date on which notice has been given or passing of orders under section 31 by the Commission, whichever is earlier. The intent of the Act is that the Commission has to permit combination to be formed, and has an opportunity to assess whether the proposed combination would cause an appreciable adverse effect on competition. In case combination is to be notified ex-post facto for approval, it would defeat the very intendment of the provisions of the Act.*

9.5. The scheme and purpose of the Act is to provide an opportunity to the Commission to evaluate the likely effects of the proposed combination on competition and regulate them appropriately. If parties to the combination deny this statutory opportunity provided

to the Commission, the same would attract penalty under Section 43A of Act.

9.6. Coming to the facts of the instant case, it is evident that, even before the proposed combination, ATL had advanced loans to RInfra, who was the seller of the target asset *i.e.* 100% of the equity shares held by it in ReGSL. Further, as a part of the proposed combination, SPA envisaged advancement of additional loan by ATL to RInfra. Thus, the circumstances were that a creditor had proposed to acquire assets of the debtor/seller, and the consideration payable for the acquisition is adjustable with the loan advanced.

9.7. ATL contended that penalty under Section 43A of the Act cannot be based on the conduct of an enterprise who is not a party to the combination. It has been claimed that RInfra is different from REGSL, which is the target acquired by ATL and hence, RInfra is not a party to the combination. The Commission does not see any merit in such a contention as RInfra is the seller in the proposed combination and had control over REGSL. It is relevant to observe that REGSL, which was acquired, did not have any business operations in or outside India and RInfra transferred its power generation, transmission and distribution businesses to REGSL for the purpose of the proposed combination. Thus, in effect, REGSL was directly related to the proposed combination as its assets were proposed to be sold to ATL. Further, in terms of the Act and the regulations made thereunder, the Acquirer *i.e.* ATL was under an obligation not to indulge in any conduct that would be contrary to the standstill obligation contained under Section 6(2) read with Section 6(2A) of the Act. The impugned conduct of advancing

loans having been pursued by ATL, the Commission does not see any legal impediment in examining the same under the relevant provisions of the Act.

9.8. The Commission is also not in agreement with ATL on the point that the standstill obligation under Section 6(2) and Section 6(2A) of the Act is applicable only to acquisition of control and that advancement of loan by the Acquirer to the seller does not amount to acquisition of control. Neither the provisions of the Act nor the regulations made thereunder postulate that penalty under Section 43A can be imposed only in cases where the coordination between the parties prior to the approval by the Commission has resulted in acquisition or change in control.

9.9. In the past, Commission has issued two orders dated 14th September, 2016 in Combination Reg. No. C-2015/08/299 (*In Re: Hindustan Colas Private Limited*) and 12th March, 2018 in Combination Reg. No. C-2015/02/246 (*In Re: UltraTech Cement Limited*), under Section 43A of the Act, clarifying that pre-payment of consideration, in part or full, amount to contravention of the obligations contained in Section 6(2) read with section 6(2A) of the Act. In the instant case, besides the earlier loans adjustable with the consideration payable, the SPA envisaged advancement of further loan to the seller, which was also *adjustable* against the consideration for the combination. In effect, these loans are in the nature of advance consideration, particularly given that ATL is not ordinarily engaged in the business of advancing loans and its business activities are horizontally and/or vertically relatable to the target businesses acquired.

9.10. It would be instructive to reproduce the observations of the Commission in its order dated 14th September, 2016 in Combination Reg. No. C-2015/08/299:

"6.9 …The Commission noted that pre-payment of price (whether refundable/nonrefundable) 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…

6.11 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."

9.11. In view of foregoing, the Commission holds that the impugned conduct of advancement of loan by ATL to RInfra and proposed adjustment of the same against the consideration payable for the combination is in contravention of the standstill obligation contained in Section 6(2) read with Section 6(2A) of the Act.

10. Having concluded a contravention of Section 6(2) of the Act, the Commission can impose penalty that may extend to one percent, of the total turnover or the assets, whichever is higher of the combination. However, the Commission considering the conduct of the parties and the circumstances of the case wherein the contravention has been established based on the information voluntarily disclosed by the parties, who have extended full cooperation in furnishing the information taken these as mitigating factors and considers it appropriate to impose a nominal penalty of INR 10,00,000/- (Indian Rupees Ten Lakhs only) on ATL.

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

12. The Secretary is directed to forward a copy of this order to ATL.