Fair Competition
For Greater Good

COMPETITION COMMISSION OF INDIA

9th March 2022

Proceedings against Adani Green Energy 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 during the hearing for Adani Green Energy Limited

Mr. Ramji Srinivasan, Senior Advocate with Mr. Shivkrit Rai, Ms. Avaantika Kakkar, Mr. Vijay Pratap Singh Chauhan, Ms. Aakriti Thakur, Advocates along with Mr. Anupam Misra, Senior Vice President and Mr. Jatin Jalundhwala, Joint President – Legal and Company Secretary, Adani Group

ORDER UNDER SECTION 43A OF THE COMPETITION ACT, 2002

This order shall govern the disposal of the proceedings initiated against Adani Green Energy Limited (**AGEL/Acquirer**) under Section 43A of the Competition Act, 2002 (**Act**) in relation to its acquisition of the entire shareholding of S.B. Energy Holding Limited (**Target**) (**Combination**) in pursuance of the show cause notice dated 14th August 2021 (**SCN**). The said transaction was notified to the Competition Commission of India (**Commission**) by AGEL in Combination Registration No. C-2021/05/837. The said notification (**Notice**) was given by AGEL on 20th May 2021, pursuant to Section 6(2) of the Act, in Form I of Schedule II to the Competition Commission

of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (**Combination Regulations**).

A. Background

2. The Notice was filed pursuant to the execution of Share Purchase Agreements by and between the Acquirer and Softbank Group Capital Limited (**Softbank**) (**Softbank SPA**) and between the Acquirer and Bharti Global Limited, both dated 18th May 2021.

3. During the review of the Combination, the Commission noted that Clause [redacted] of the Softbank SPA (**Clause**) reads as follows:

[redacted]

[redacted]

4. In terms of Regulation 14 of the Combination Regulations, a letter dated 4th June 2021 was issued to AGEL (**RFI**) wherein, *inter alia*, AGEL was required to share the details of steps taken (if any)/proposed to be undertaken and submit the documents containing details of deliberations made, information exchanged, and decisions taken pursuant to the Clause.

5. In this regard, AGEL, *vide* response to RFI dated 9th June 2021 and voluntary submissions dated 12th June 2021, *inter alia*, submitted [redacted]

6. The Commission approved the Combination under Section 31(1) of the Act on 30th June 2021 (**Order**), upon competition assessment of the business activities of the parties and after arriving at the opinion that the Combination is not likely to cause any appreciable adverse effect on competition in India.

B. Initiation of proceedings under Section 43A of the Act

7. The Commission, in its meeting held on 9th August 2021, considered the issue of potential contravention of standstill obligations as contained under Section 6(2A) of the Act given the terms of the Clause and the submissions of AGEL thereon made during the review of the Combination. The Commission was of the *prima facie* view that the Clause may have had the impact of consummating a part of the Combination before the expiry of the period specified under Section 6(2A) of the Act, and by agreeing to the same, the Acquirer failed to file notice in terms of Section 6(2) of the Act. Accordingly, the Commission issued SCN under Section 43A of the Act on 14th August 2021.

8. The observations of the Commission in the SCN are as under:

i. The purported action under the aforesaid Clause comes into effect right from the date of the execution of the Softbank SPA i.e., 18th May 2021, and therefore precedes the consideration and approval of the Combination by the Commission;

ii. The Clause, *inter alia*, (i) allows the parties to discuss the ongoing business and operations of the Target and its subsidiaries; (ii) allows the Acquirer to provide inputs on the business of the Target; and (iii) provides for the Target to take such inputs into account in the best interests of the Target and its subsidiaries. *Prima facie*, the scope of the Clause is broader than what has been stated by the Acquirer, as it envisages the discussion on the "*on-going business and operations of the target*". Such discussions and consequent inputs which may be provided by the Acquirer may result in the parties ceasing to act independently or ceasing to compete as the parties were competing before the Combination resulting in coordinated outcomes before the expiry of timelines contained in Section 6(2A) of the Act;

iii. *Prima facie*, the safeguards contained in the Softbank SPA in the form of clean team protocols and the inputs being non-binding do not appear to be commensurate with the scope and likely effect of the Clause considering that exchange of information and

provision of inputs is per se sufficient to lead to a situation similar to tacit collusion even if the inputs were non-binding or clean team protocols were followed. The issue of concern in such cases is access to information and the decisions being based on a wider pool of information, including the inputs of a competitor who is in the process of acquiring the business;

iv. Notwithstanding the limited scope of clean team protocols as a safeguard in the current situation, the submissions of the Acquirer on following clean team protocols in aforesaid meetings also appear to be contradictory with the intent and purpose of the Clause. [redacted] of the Softbank SPA, which provides for clean teams, reads:

[redacted]

It was observed that, while on one hand, [redacted] states that information will be disclosed only to duly constituted clean teams which shall be ring fenced from management, on the other hand, as per the Clause, the inputs are to be taken into account in the best interests of the Target. It is noteworthy that the aspect of "taking into account" necessarily implies that information is shared with the management, as in the absence of such a construct, the clean teams by themselves cannot act on the inputs on their own.

9. AGEL filed its reply to the SCN on 3rd September 2021 along with a request for oral hearing in terms of Regulation 48 of the General Regulations, through their legal representatives, after seeking extension of time. The response was refiled on 7th September 2021 to comply with the Practice Direction issued by the Commission to ensure that pleadings are also signed by the person authorised by the board of directors of AGEL (**Response to SCN**).

10. In its meeting held on 11th October 2021, the Commission considered the Response to SCN and decided to grant an oral hearing to AGEL on 26th October, 2021. However, *vide* letter dated 19th October 2021, AGEL requested to reschedule the date of the oral hearing. The Commission accepted the request of AGEL and granted a personal hearing on 10th November 2021. Accordingly, AGEL presented its case before the Commission on 10th November 2021. AGEL requested allowing submissions of relevant precedents/documents cited during the course of hearing, which was allowed by the Commission. AGEL submitted a compilation of the relevant precedents/documents that were cited during the personal hearing, *vide* email dated 15th November 2021. Further, AGEL refiled the non-confidential version of the Response to SCN on 9th December 2021, waiving certain confidentiality requests made earlier.

C. Submissions of AGEL

11. In the Response to SCN, AGEL contended the following:

I. Clause should be read plainly without supposing extraneous meaning to the said clause and that the Clause is reasonable

12. That the Hon'ble Supreme Court of India *in Nabha Power Limited v. Punjab State Power Corporation Limited and Anr* [1] (**Nabha Decision**), while interpreting the terms of a commercial contract, observed that *"it should certainly not be an endeavour of commercial courts to look to implied terms of contract....Thus, normally a contract should be read as it reads, as per its express terms. The implied terms is a concept, which is necessitated only when the Penta-test referred to aforesaid comes into play. There has to be a strict necessity for it."*

13. That, based on reasons detailed hereunder, it is submitted that the Commission has implied meaning to Clause which is not possible from a plain reading of the said Clause, and that the

[1] Civil Appeal No. 179 of 2017

Clause is inherent and proportionate to the objective of ensuring certainty in business valuation of the Target and preservation of the same and does not violate the standstill obligations provided under Section 6(2A) of the Act.

14. In this regard, the Acquirer has made the following submissions to emphasise that the impugned clause is reasonable:

a. That the intent behind the Clause is solely to monitor and preserve the economic value of the Target based on any material developments or events between the signing and closing of the Transaction typical to transactions of this nature, [redacted]

b. That the Clause serves the purpose of assisting in preserving the economic value of the Target and conducting a due diligence review typical to transactions of this nature. That the information under this Clause is provided to the clean team of the Acquirer (which is constituted under [redacted] of the Softbank SPA) for the following reasons: (a) to assess the occurrence of any material adverse effect; (b) to assess potential [redacted] revisions to the consideration payable to the Sellers, [redacted] and (c) such information is also required in procuring other regulatory approvals [redacted] To illustrate the same, it has been stated that the Target has 3.554 GW as under construction capacity, which was awarded to the Target under a competitive bidding process at the quoted tariff for the respective projects, and this capacity needs to be constructed in accordance with the timelines outlined in the respective power purchaser agreements in order to avoid any penalties and preserve the economic value of the Target;

c. That the Clause envisages a mechanism through which the Acquirer receives information about any material developments that affect the Target's projects and subsidiaries. The information in relation to such material developments is required to be provided to the Acquirer to enable the Acquirer to assess whether any specific development resulted in or could lead to material adverse effect on the Target and /or its subsidiaries. In the event of the occurrence of a material adverse effect which would directly affect the Acquirer's business valuation, the Acquirer would have the ability to terminate the agreement and walk away from the Transaction;

d. That in complex transactions, conducting such [redacted] teleconferences between signing and closing are routine industry practice and it enables parties to take stock of various conditions precedent necessary for achieving completion of the transaction within the agreed timelines. These forums are also necessary for the acquirer to understand if there have been any material developments that have affected the target business. The current Transaction is no different, and these teleconferences were of such a nature, and the Target/Seller informed the Acquirer in good faith of any material developments concerning the Target and its subsidiaries. Moreover, such measures are reasonable in order to protect the legitimate business interests of the Acquirer. Specifically in such teleconferences the Acquirer has balanced the twin goals, viz., (i) complying with the applicable laws (which includes complying with the provisions of the Act by instituting safeguards such as clean teams); and (ii) trying to ascertain whether the value of the Target has been preserved as advertised by the Seller;

e. That whilst considering whether an interim covenant violated the provisions of Section 6(2A) of the Act, the Commission in its decision in the Airtel/Tata case (**Airtel Decision**[2]) acknowledged that *"… to ensure the value of business is preserved, the acquirer of a business may also be permitted to impose customary standstill and interim arrangements on the target"*. The Commission further noted that *"it is incumbent on*

[2] Order of the Commission under Section 43A of the Act dated 27.08.2018 in relation to Notice given under Section 6(2) of the Competition Act, 2002 by Bharti Airtel Limited: Combination Regn. No. C-2017/10/531

the acquirer to ensure that the form and scope of the aforesaid customary arrangements imposed by it on the target is inherent and proportionate to the objective of ***ensuring certainty in business valuation and preservation of the same****"* (emphasis added)

f. *That sharing of information is not per se violative of Section 6(2A) of the Act:* As stated, interim covenants such as the Clause are routine in share transfers, asset acquisitions and business transfers. AGEL has made reference to the practices of the European Commission (**EC**). It has been submitted that while assessing gun-jumping, the EC also recognizes that *"****it is both common and appropriate for clauses aimed at protecting the value of an acquired business between the signing of a purchase agreement and closing to be included in sale and purchase agreements.*** *Consequently, as noted by Altice, the Ancillary Restraints Notice envisages that agreements to abstain from material changes to a target's business until closing can be considered directly related and necessary to the implementation of a concentration. Indeed, such clauses restricting the seller from acting in a manner inconsistent with the outcome of the merger or from making major changes to the business can be reasonably* ***justified to ensure the value of the business acquired is preserved, in general and as compared to the agreed purchase price. Such clauses can take a variety of different forms including prohibitions on certain actions, with or without a veto right, or a positive obligation to continue to run the target business in a certain manner.****"*[3] (emphasis added). It has been stated that the Clause solely facilitated sharing of information for the purpose of monitoring and preserving the economic value of the Target, and that mere presence of similar interim covenants would not compromise the independence of the Target except to the extent that the Target and its management would be constrained from making material changes or decisions that would impact the value of the business; and

g. *Effect of Clause — Actual information exchanged via the teleconferences:* AGEL has made submissions on actual information exchanged and stated that the Target informed the Acquirer [redacted]

[3] EC decision of 24th April 2018 in case M.7993, Altice/PT Portugal, para. 70.

[redacted]

Moreover, as provided in the response to RFI, the information shared in the teleconferences also included the necessary updates to be given to the Acquirer's team on the progress of construction activities and timelines for the commissioning of the under-construction projects of the Target.

II. Inputs provided are non-binding

15. That the inputs provided by the Acquirer are not binding on the Target, and the Target has complete discretion to accept or reject the same and therefore absolute discretion to act independently.

16. That, while interpreting a contractual clause, the clause must be read as a whole and a piecemeal interpretation of the same will lead to inconsistent results. As submitted, the Target's discretion to take into account the inputs given by the Acquirer is expressly captured in the Clause itself, and the Clause only provides a right to the Acquirer to share their inputs and it does not place any obligation on the Target to accept such inputs.

III. The Parties undertook sufficient safeguards while implementing the Clause, in consonance with international jurisprudence

17. In this regard, AGEL has submitted that the European Commission has emphasised the need for safeguards in the form of confidentiality agreements, non-disclosure agreements, or clean team arrangements to ensure the preservation of competition while information is being shared between parties to a transaction. Having said that, contrary to international jurisprudence provided on this issue, the Commission in the SCN has presumed that exchange of information and provision of inputs, even with a duly constituted clean team, is per se sufficient to lead to tacit collusion even if the inputs were non-binding and clean team protocols were in place.

IV. The case facts are different from Airtel Decision

18. The Acquirer has sought to differentiate the present case from the Airtel decision, wherein the contractual arrangement envisaged an anteriority clause which prescribed a notional date, which became effective prior to the Commission's approval (or upon closing) was considered as "giving effect" to a proposed combination. It has been stated that the Commission's decision in the said case should not be a binding precedent for the reason that the Clause merely facilitated an interim arrangement between the signing and closing of the Transaction and did not lead to consummating any part of the Transaction prior to the Commission's approval.

19. The Acquirer has requested the Commission to strike a balance between prohibiting gun-jumping and legitimate reasons for sharing of information necessary for monitoring and preserving the economic value of the Target.

20. It has been stated that the Commission has stressed solely upon the object of the Clause and its "potential effect" rather than considering the parties' stated intent behind the Clause. In such a case, the purpose of issuing a show cause notice to the Parties gets repudiated. In this regard, the Acquirer has referred to the judgement of the Hon'ble Supreme Court of India in the matter of *ORYX Fisheries Private Limited v. Union of India* (**Oryx Decision**). As per the same,

"It is of course true that the show cause notice cannot be read hypertechnically and it is well settled that it is to be read reasonably. But one thing is clear that while reading a show-cause notice the person who is subject to it must get an impression that he will get an effective opportunity to rebut the allegations contained in the show cause notice and prove his innocence. If on a reasonable reading of a show-cause notice a person of ordinary prudence gets the feeling that his reply to the show cause notice will be an empty ceremony and he will merely knock his head against the impenetrable wall of prejudged opinion, such a show cause notice does not commence a fair procedure especially when it is issued in a quasi-judicial proceeding under a statutory regulation which promises to give the person

proceeded against a reasonable opportunity of defence. Therefore, while issuing a show-cause notice, the authorities must take care to manifestly keep an open mind as they are to act fairly in adjudging the guilt or otherwise of the person proceeded against and specially when he has the power to take a punitive step against the person after giving him a show cause notice. The principle that justice must not only be done but it must eminently appear to be done as well is equally applicable to quasi-judicial proceeding if such a proceeding has to inspire confidence in the mind of those who are subject to it."

21. It has been stated that, as opined by the Hon'ble Supreme Court of India, it becomes imperative for the Commission to consider the submissions herein pertaining to the intent of the Clause and to not base their decision solely on the *prima facie* interpretation of the object of the Clause. It has been stated that the basis for assessing a contractual provision and its actual purpose should be the intent of the parties. To this effect, reference has been made to the Airtel Decision, wherein it was noted that *"the exact incentives for entering into any agreement are best known to the parties and the Commission can only be guided by the nature/scope of agreement and information on record."*.

V. Additional Submissions

22. Apart from the aforesaid submissions, the Acquirer has requested the Commission to take a lenient view and impose no penalty considering, *inter-alia*, its past compliance track record, limited period of default etc.

D. Analysis of the submissions of the Acquirer

23. Having considered the written and oral submissions of AGEL, the Commission proceeds to determine whether the Clause has had the impact of consummating a part of the Combination before the expiry of the period specified under Section 6(2A) of the Act and whether, by agreeing to the same, the Acquirer has failed to file a notice in terms of Section 6(2) of the Act. However, before going into the specific issues relating to the impugned Clause and

submissions of the Acquirer thereon, it would be appropriate to discuss the relevant framework for the assessment of issues involving potential violation of standstill obligations.

24. The provisions relating to contravention of standstill obligations, or what is referred to as gun-jumping, are contained under Section 6(2A) read with Section 6(2) of the Act. Section 6(2A) of the Act reads:

> *"**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."* (emphasis added)

25. It is observed that the Act prohibits any combination from "*coming into effect"* until the final decision has been taken on the combination by the Commission or the specified period has passed from the date of notification of the combination. The Commission in its decisional practice has elaborated on what is meant by "*coming into effect"*.

26. Considering that the mandate of the Act is in terms of preventing any likelihood of AAEC, the question of when a combination can be said to have *'come into effect'* also needs to be considered in the same spirit. The Commission, accordingly, made the following observation on the need and rationale of standstill obligations in the Airtel Decision,

> *"the basic objective of standstill obligations contained in Section 6(2A) of the Act is to ensure that the parties to a combination transaction compete as they were competing before the initiation of combination process till the time the transaction is reviewed for any appreciable adverse effect on competition ("**AAEC**") and approved by the Commission. In other words, the standstill obligations essentially require that the parties carry on with their ordinary course activities completely independent of each other and to the fact of the combination transaction."*

27. The objective of standstill obligations as explained above in the Airtel Decision is two-fold: (i) to prevent any harm to the competitive process in the interim stage when the combination

was under review regardless of the final decision; and (ii) to prevent any harm to competition which is not capable of being restored in the event that the transaction is not approved or approved with modification.

28. The Commission, in another decision relating to gun jumping wherein the notice was filed by Hindustan Colas Private Limited[4] (**Hindustan Colas Decision**), further brought out the concern behind the aforesaid boundaries drawn in terms of "potential competition distortions" and sought to indicate that the parties should not undertake any action/conduct etc., before the approval of the Commission which may cause "potential competition distortions". The Commission also presented an indicative list of potential competition distortions in form of, (i) Acquirer gaining a strategic advantage; (ii) reducing the incentive and will of the target to compete; and (iii) a reason/basis to access the confidential information of the target and/or creating situations similar to tacit collusion.

29. The aforesaid observations on the need and rationale behind the standstill obligations and the concerns in terms of potential competition distortions are not merely abstract generalisations. By implication, the same brings out the test conditions for determining when a combination can be deemed to have come into effect. As has been brought out, the impugned conduct/arrangement etc. need to be examined in terms of: (i) reduction in competition intensity test; (ii) infringement with ordinary course of activities test; and (iii) likelihood of causing potential competition distortions, for deciding on the aspect of when a combination can be said to have "*come into effect"*.

30. In accordance with the above approach, the Commission has had the occasion to examine the consistency of certain specific actions of the parties viz., pre-payment of consideration, anteriority clause in the combination agreement etc. with the principle of "coming into effect". However, the issue of standstill obligations is very broad and can include in its ambit a wide diversity of actions, arrangements, etc., other than the aforesaid specific actions analysed by the Commission thus far. Coming to the instant case, it is a first wherein the

[4] Order of the Commission under Section 43A of the Act dated 14.09.2016 in relation to Notice given under Section 6(2) of the Competition Act, 2002 by Hindustan Colas Private Limited: Combination Regn. No. C-2015/08/299

subject matter in broad terms is agreement/arrangement between the parties for exchange of information/discussion on the on-going business and operations of the companies; allowing the acquirer to provide inputs on various elements of the target business; and agreeing that the target will take such inputs into account after the execution of definitive agreements and, by implication, before the transaction was approved by the Commission. The Acquirer on its part has submitted that the prime consideration for such exchange of information is monitoring and preserving the economic value of the Target and accordingly, has requested the Commission to strike a balance between prohibiting gun-jumping and the legitimate reasons for sharing of information.

31. There is no denying that certain exchange of information between the parties to a combination is inherent in the very process of mergers and acquisitions. The nature and scope of information to be exchanged varies, *inter alia,* (i) with the stage at which the merger process stands viz., whether the merger is in the due diligence stage, when no definitive agreements have been executed or whether the merger is in the integration planning stage after the execution of definitive documents but before closing of the transaction; (ii) with the extent of integration envisaged between the parties; and (iii) considering the nature of the businesses proposed to be integrated, as some businesses may have more complex structures, etc. During the due diligence stage, the focus of information exchange would be on information which facilitates the assessment of the suitability of the target for the acquirer i.e., whether the target fits in the business strategy of the acquirer and for the purpose of valuation of the target business. The focus of the information exchange after execution of definitive agreements shifts more towards ensuring the preservation of economic value of the business and to undertake integration planning.

32. Having noted the inherence of the exchange of information, in broader terms, in the process of businesses combining from a business perspective, it is also important to note that the exchange of information between the parties at any stage before the transaction has been assessed and approved can also have the effect of leading a combination to "come into effect." This may be true if, for any reason (legitimate business rationale or otherwise), the parties to a combination get involved in an exchange of commercially sensitive information.

The Commission has already been cognizant of such a possibility and, to that effect, the Compliance Manual for Enterprises (**Competition Compliance Manual**) issued by the Commission makes specific reference to this aspect. The Competition Compliance Manual notes that any action in furtherance of the transaction, including sharing of commercially sensitive information before the approval is granted, is likely to be seen as an instance of gun-jumping. It further notes and cautions the stakeholders that as mergers/amalgamations, require a pre-transaction due diligence as well as a certain level of post-signing integration planning, parties need to be extremely cautious that such actions are not seen as substantive gun-jumping.

33. Thus, having noted both the inherence of the exchange of certain information between the parties to a combination before the filing of the transaction or after filing but before the approval of the same and plausibility of the same for causing potential competition distortions, it is indeed important to establish a decisional practice which balances the legitimate reasons for sharing of information and the concerns of gun-jumping. However, the Commission has always been cognizant of the fact that certain actions/arrangements can have both the aspects, i.e., inherence to the legitimate objectives of the parties and at the same time raising concerns of gun-jumping. Accordingly, for such situations, the Commission has clarified that such actions/agreements need to be examined in terms of the inherence-proportionality framework. The Commission in Airtel Decision observed that:

"The Commission agrees that a notional date may be indeed required to ensure certainty in respect of valuation of a business and that further to ensure that the value of business is preserved, the acquirer of a business may also be permitted to impose customary standstill and interim arrangements on the target. However, it is incumbent on the acquirer to ensure that the form and scope of the aforesaid customary arrangements imposed by it on the target is inherent and proportionate to the objective of ensuring certainty in business valuation and preservation of the same and that such conditions do not violate standstill obligations as envisaged in the Act."

34. It can be noted that the Commission, in the Airtel Decision, categorically accepted that the acquirer may be permitted to impose customary standstill obligations and interim arrangements on the target to ensure certainty in valuation. However, to balance the concerns of any potential competition distortions, the Commission prescribed the inherence-proportionality test for determining whether the customary obligations imposed on the target are consistent with the standstill obligations provided under Section 6(2A) or not. It is only fair that the onus to prove and ensure that the action/agreement under review is inherent and proportionate to the legitimate business objectives, such as ensuring preservation of economic valuation, is on the parties to a combination.

35. Apart from ensuring the inherence and proportionality of the agreements/actions with the legitimate business objectives, as observed by the Commission in the Airtel Decision, the parties to a combination can also put in place a system of safeguards commensurate with the gun-jumping concern which can potentially arise.

36. Thus, to summarise, the gun-jumping assessment is, in general and by default, a balanced exercise which considers the likelihood of any action/agreement etc. to infringe with the ordinary course activities of the parties; or leading to reduction in the competition intensity; or having the potential of causing competition distortions. The likelihood is weighed in terms of the inherence-proportionality test and a review of the efficacy of safeguards put in place to avoid any adverse effect of the action/agreement on the competition. To this effect, the Commission does not differentiate between the action/conduct/agreement/arrangement and between a particular type of action, etc., which are considered merely forms of potential infringements for achieving a substantive outcome.

37. Accordingly, against this backdrop, the specific issues relating to the Clause are examined.

Issues for determination

38. The Commission is of the view that the key issues for examination of the Clause being consistent with standstill obligations are:

(i) Whether the scope of the Clause is broader than what has been stated by the Acquirer i.e., whether the same is not inherent/proportionate to the objectives as stated by the Acquirer;

(ii) Whether the scope of safeguards contained in the Softbank SPA in the form of clean team protocols is commensurate with the potential gun-jumping concerns; and

(iii) Whether the safeguards in the form of clean team protocols contained in the Softbank SPA are practically likely to work, as have been stated.

39. Apart from the key issues identified above, the Acquirer has also made submissions on the (i) interpretation of the Clause; (ii) inputs being non-binding; and (iii) comparison of the instant case with the Airtel Decision, which also need to be examined.

40. In the subsequent section, the Commission has considered and determined on all the submissions of the Acquirer, including those on the substantive issues raised in the SCN as identified above and other submissions of the Acquirer.

I. Assessment of inherence/proportionality of the Clause

41. AGEL has submitted that the Clause was intended to assess that there is no material adverse effect and accordingly, to preserve the economic value of the Target and conducting a due diligence review typical to transactions of this nature.

42. In this regard, the Acquirer in its submissions has primarily referred to its intent to preserve value but has not made any substantive submissions as to the requirement of: (i) need for discussions; and (ii) to include the "ongoing business and operations" as a part of discussions in this regard. The Acquirer has not made any submissions as to why the Clause had to be worded in such broad terms, when specific clauses to preserve economic valuation were already included in the Softbank SPA. The Clause includes in its ambit the potential to discuss the ordinary course activities which may not have any relevance to the material adverse effect but may potentially lead to coordinated outcomes.

43. In this regard, the Acquirer was explicitly asked during the course of review of the Combination to submit documents and details of deliberations made, information

exchanged, and decisions taken pursuant to the Clause. The Acquirer made certain submissions regarding the discussions at that stage and presently as a part of Response to SCN, but the same were not at that stage, and have not at this stage, been supported by any documents. In the absence of any such submissions, the references are only indicative and do not reflect the complete potential effect of the Clause. The Commission, considering the possibility of differences in perceived objectives and the letter of the agreements has already noted in the Airtel Decision that *"the exact incentives for entering into any agreement are best known to the parties and the Commission can only be guided by the nature/scope of agreement and information on record."* Applying the same ratio in the instant case where the Acquirer has made submissions on its intent and provided "instances" of information exchanged, considering the wording of the Clause in the agreement and the information submitted, possibility of exchange of competitively sensitive information, and/or any coordinated outcome (explicit/tacit) cannot be ruled out.

44. Accordingly, even if the Commission agrees that the intent of the Acquirer was limited to monitoring and preserving the economic value of the Target, the Clause cannot be considered as inherent or proportionate to the objective, considering that it explicitly brings in the discussions on business and operations in its scope in addition to specific provisions relating to monitoring and preserving the economic value of the Target.

II. Whether the scope of safeguards contained in the Softbank SPA in the form of clean team protocols is commensurate with the potential gun-jumping concerns

45. The Acquirer has also made a submission on balancing the twin goals, viz., (i) complying with the applicable laws (which includes complying with the provisions of the Act by instituting safeguards such as clean teams); and (ii) trying to ascertain whether the value of the Target has been preserved as advertised by the Seller. In this regard, the Acquirer has made reference to the practices of the EC, and citing the same, has submitted that, contrary to international jurisprudence provided on this issue, the Commission in the SCN has presumed that exchange of information and provision of inputs even with a duly constituted

clean team is per se sufficient to lead to tacit collusion, even if clean team protocols were in place.

46. As regards the safeguards in form of clean team protocols, the Commission agrees that clean team protocols do have the potential to safeguard the exchange of competitively sensitive information, but for the such safeguards to be effective, various aspects of clean teams, ranging from constitution to rules of engagement, need to be expressly laid down and complied with in letter and spirit. The Competition Compliance Manual brings out some of the clean team protocols that can mitigate the risks of gun-jumping. It notes,

"To mitigate such risks, it is recommended that while conducting due diligence / integration planning, parties constitute a limited team of individuals, comprising preferably members of the senior management, internal legal team as well as external legal counsel ("Clean Team"). Commercially sensitive information of the other party should only be accessible to such Clean Teams. The Clean Teams should not include personnel who are involved in pricing, marketing, sales, etc. in order to ensure that such personnel are not (consciously or unconsciously) influenced by any competitively sensitive information in the course of the day-to-day operations of the business (such as determining pricing, pricing strategy, sales quantity, marketing strategy, terms of consumer contracts, etc.)."

47. From the perusal of Clause [redacted], it is observed that the clause refers [redacted] The Acquirer on its part has made no submissions on the Clean Team composition or offered any clarification in the context of the working of the Clause and has not gone beyond a mere reference to the fact of there being clean teams. Thus, it is observed that the clean team safeguard is not commensurate with the scope and likely effect of the Clause.

III. Whether the safeguards in form of clean team protocols contained in the Softbank SPA are practically likely to work as have been stated.

48. As regards the working of the Clean Teams, the SCN had pointed out a contradiction in the impugned Clause and the operation of clean team protocol as envisaged in Clause [redacted] of the Softbank SPA. It was stated that, while on the one hand, Clause [redacted] states that information will be disclosed only to duly constituted clean teams which shall be ring fenced from management, on the other hand, as per the Clause, the inputs are to be taken into account in the best interests of the Target. It is noteworthy that the aspect of "taking into account" necessarily implies that information is shared with the management as, in the absence of such a construct, the clean teams by themselves cannot act on the inputs on their own.

49. While the Acquirer has made submissions on the Clean Teams and the significance of clean teams in balancing the objectives of compliance of law and preservation of value, the Acquirer has chosen to completely omit any response on the apparent contradictions highlighted in the SCN relating to the functioning of the Clean Teams. Thus, what is observed is that, while there is a provision of Clean Teams, the same by itself is not sufficient to absolve the parties of their standstill obligations. In the instant case, it can be concluded that the provision for Clean Teams is disconnected with the aim of safeguarding the aspect of standstill obligations both in letter and spirit. Accordingly, the submissions of the Acquirer on the aspect of safeguards are not considered as tenable.

IV. Analysis of other submissions of the Acquirer

50. On the aspect of interpretation of the Clause, the Acquirer has made two submissions:

i. The Acquirer, at the outset, has made a reference to the Nabha Decision and on that basis, it has been stated that the Clause should be read plainly without supposing "extraneous meaning" to the said clause;

ii. Subsequently, the Acquirer has stated that the Commission has stressed solely upon the object of the clause and its "potential effect", rather than considering the parties'

stated intent behind the clause. In this regard, the Acquirer has referred to the Oryx Decision and to the Airtel decision of the Commission to emphasise the relevance of consideration of "intent".

Based on the aforesaid, it has been stated that the Commission, while interpreting the Clause, must be guided by the intent and purpose behind it which has been provided by the parties.

51. As regards the submissions of the Acquirer on the Commission supposing an "extraneous meaning" to the Clause, and the Acquirer's reference to the Nabha Decision, the Commission observed that the Nabha Decision is in the context of the interpretation of the terms of a commercial contract while settling a dispute between the parties to a contract on the meaning/scope of the terms agreed. The facts and circumstances of the present proceedings are quite different as, under the present situation, the regulator is in the process of examining the scope and effect of a clause for being consistent with the regulatory framework. Accordingly, the Nabha Decision is not applicable to the issue at hand.

52. Apart from the submissions on the Clause to be read plainly, the Acquirer has stated that the Commission has stressed solely upon the object of the clause and its "potential effect" rather than considering the parties' stated intent behind the clause. In this regard, the Acquirer has referred to the Oryx Decision and to the Airtel Decision of the Commission to emphasise the relevance of consideration of "intent". Based on the aforesaid, it has been stated that the Commission, while interpreting the Clause, must be guided by the intent and purpose behind it, which has been provided.

53. At the outset, it is observed that the approach of the Acquirer in referring to the Nabha Decision wherein 'plain' reading of the Clause was being emphasised, and then arguing the Commission to consider Parties' intent (which has been said to be limited to preserving the valuation) and not what could be the "potential effect" of the Clause appears inconsistent and contradictory. It may be noted that both the intent of the parties and the actual/potential effects of the arrangement/conduct are relevant considerations, and that is precisely why a show cause notice has been issued to the Acquirer so that all the relevant aspects be considered. The preservation of value defence in the context of the imposition of customary

standstill arrangements is accepted internationally, and the Commission has also recognised the same in its decisional practice. However, the consistency of the same with standstill obligations is the moot point, and the assessment framework for the same involves examination of any such clause/conduct threadbare in terms of inherence to the objective, proportionality of the scope, and the strength of the safeguards put in place for ensuring compliance with the regulatory framework. Thus, the submissions of the Acquirer to consider their intent and ignore potential effects solely relying on the intent and other related references made by the Acquirer on the requirements of a show cause notice are not considered as tenable and denied.

54. The Acquirer has also referred to the Airtel Decision and pointed out the observations of the Commission that *"the exact incentives for entering into any agreement are best known to the parties and the Commission can only be guided by the nature/scope of agreement and information on record."* Based on the same, it has been stated that the Commission, while interpreting the Clause, must be guided by the intent and purpose behind it which has been provided by the Parties. While it is already stated and reiterated that intent is considered but not as a sole factor, it needs to be pointed out that the reference of the Acquirer to the Airtel Decision is misplaced. The observations of the Commission in the Airtel Decision were, in fact, to the contrary and to emphasise the "effect" of the arrangement/conduct and in that context, it was stated that the exact incentives for entering into any agreement (i.e., what the parties were envisaging) are best known to the parties and the Commission can only be guided by the nature/scope of agreement and information on record (i.e., likely effect of the arrangement/conduct).

55. As regards the inputs being non-binding, the Commission, while issuing the SCN, had noted that the inputs are not binding on the Target. Accordingly, the Commission, in the SCN, had specifically expressed its concerns of tacit collusion and noted that the issue of concern in such cases is access to information and the decisions being based on a wider pool of information, including the inputs of a competitor who is in the process of acquiring the business. Under such circumstances, the eventual result may be a coordinated outcome regardless of the inputs being binding or otherwise. The Acquirer has failed to make any

submissions on the crux of the SCN on this issue and merely repeated the same stance, which even the Commission has taken note of in the SCN.

56. Thus, based on the aforesaid, the Commission is of the opinion that the Clause can potentially facilitate the exchange of commercially sensitive information, and the same is not inherent and proportionate to the objective of preserving the economic valuation of the business and is also not supported by adequate safeguards. However, whether the Clause is such that, by agreeing to the same, the Acquirer may be regarded as having failed to file notice in terms of Section 6(2) of the Act is another aspect which needs to be considered. AGEL has also requested to consider the difference between the impugned Clause and the ER Clause, which was the subject matter of examination in Airtel Decision.

57. The Commission, in this regard, observed that the contractual arrangements in certain cases may imply contravention of standstill obligations in their own right and, in certain cases, the contractual arrangements can be considered as facilitating the subsequent actions/conduct which may be in contravention of standstill obligations. For example, while the ER Clause considered by the Commission in the Airtel Decision was an anteriority clause which, by its terms itself, was found to be causing potential competition distortions and the Clause, which is the subject matter of the instant case, is in the category creating an enabling framework, which may facilitate an exchange of competitively sensitive information, inadvertently or by design, in the course of parties furthering their legitimate business objectives. However, this distinction between the nature and effect of the clauses may not be of much relevance considering the concerns of potential of tacit collusion. This aspect has also been clarified by the Commission in another case involving pre-payment of consideration in context of the argument that pre-payment of price has not resulted in any benefit or control to the acquirer. The Commission observed:

> *"Thus, considering the fact that such arrangements may facilitate tacit collusion and that there is no mechanism to ensure any safeguards in this regard, any finding on the aspects of actual acquisition of control/influence over the Target Assets or access to competitively sensitive information is not required."*

Likewise, whether the arrangement directly leads to competition distortions by implication or whether the same creates an enabling framework, the possibility of the same leading to competition distortions is enough as there is no mechanism to ensure any safeguards in this regard.

58. Considering all the relevant aspects of the case, the Commission is of the opinion that the contractual arrangements similar to the impugned Clause should be discouraged, and parties to a combination, in general, would also be well advised to ensure adherence to inherence/proportionality principle in the contractual terms and resulting actions/conduct. Wherever it is felt that certain restrictions are required to be imposed or certain information is required to be exchanged/discussed to ensure preservation of economic value of assets or any other such legitimate objective, the parties ought to strive to make the arrangement as objective and precise as possible to avoid any likelihood of inference on interference with ordinary course activities of the target or causing any competition distortions in contravention of standstill obligations. Likewise, wherever applicable, the safeguards should be commensurate with the scope and effect of the conduct/arrangement in letter and applied similarly in spirit.

59. Thus, based on the analysis of nature/scope of the Clause duly considering the response of AGEL, the Commission is of the opinion that the Clause, as worded, by itself amounts to consummating a part of the Combination before the approval of the same by the Commission, and by agreeing to the same, the Acquirer has failed to file a notice for the Combination in accordance with Section 6(2) of the Act. Accordingly, it attracts 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 percent of the total turnover or the assets, whichever is higher, of such a combination."

60. In terms of Section 43A of the Act, the Commission can levy a maximum penalty of 1 per cent of the combined value of the worldwide turnover of the parties. However, the Commission has sufficient discretion to consider the conduct of the parties and the circumstances of the case to arrive at the appropriate amount of penalty. Considering the various aspects of the issue of exchange of information in course of mergers and acquisitions in general and in the context of the Clause in particular, the Commission is of the opinion that what is more important at this stage is to increase awareness amongst the stakeholders as regards their obligations in terms of standstill obligations in general and specifically relating to exchange of information. Accordingly, the Commission has elucidated the applicable approach to various forms of potential gun-jumping actions/arrangements in general and specific to the information exchange and as regards the quantum of penalty, the Commission decided to impose a nominal penalty of INR 5,00,000/- (INR Five lakh only) on AGEL. AGEL shall pay the penalty within 60 days from the date of receipt of this order.

61. The Secretary is directed to inform AGEL accordingly.