



COMPETITION COMMISSION OF INDIA

21st November, 2019

Proceedings against Canada Pension Plan Investment Board and ReNew Power Limited under Chapter VI of the Competition Act, 2002

CORAM:

Mr. Ashok Kumar Gupta
Chairperson

Ms. Sangeeta Verma
Member

Mr. Bhagwant Singh Bishnoi
Member

Appearances during the hearing held on 18th July, 2019

For CPPIB : Mr. Amit Sibal alongwith Mr. Saksham Dhingra, Mr. Rahul Rai, Mr. Rahul Satyan, Mr. Pranav Mody and Ms. Rajshree Sharma, Advocates

For ReNew : Mr. Rajshekhar Rao alongwith Mr. Gaurav Desai, Mr. Vijay Pratap Singh Chauhan and Ms. Shruti Bhat, Advocates

ORDER UNDER SECTIONS 43A AND 44 OF THE COMPETITION ACT, 2002

This common Order shall dispose of the proceedings under Sections 43A and 44 of the Competition Act, 2002 against Canada Pension Plan Investment Board and ReNew Power Limited, as a large part of the impugned issues are common and similar arguments were made by both the said parties.



Background

1. In the instant matter, the Commission initiated proceedings under Section 20(1) of the Competition Act, 2002 [**Act**] against ReNew Power Limited [**ReNew**] and Canada Pension Plan Investment Board [**CPPIB**] based on their press releases dated 2nd April, 2018 and 3rd April, 2018, respectively. The impugned press releases indicated that ReNew acquired Ostro Energy Private limited [**Ostro**] with the support of the additional investment made by CPPIB in ReNew.
2. Earlier, on 27th November, 2017, CPPIB gave a notice bearing Combination Registration No. C-2017/11/536, under Section 6(2) of the Act [**Notice**] regarding its proposed acquisition of about 16.33% of the equity share capital of ReNew [**Transaction I**]. Transaction I contemplated the following two sets of acquisitions:
 - 2.1. *Secondary Acquisition*: Acquisition of equity shares that represent approximately 6.33% of the equity share capital (on a fully diluted basis) of ReNew by CPPIB from Asian Development Bank [**ADB**]; and
 - 2.2. *Primary Acquisition*: Acquisition of compulsorily convertible preference shares (**CCPS**) of ReNew by CPPIB that will mandatorily convert into equity shares amounting to not more than 10% of the equity share capital of ReNew. In response to the letter of the Commission, CPPIB has clarified that this is the additional investment referred to in its press release dated 3rd April, 2018, discussed above. However, in lieu of CCPS to the extent of 10% of equity share capital of ReNew, CPPIB subscribed to equity shares representing 9.7% of the equity share capital of ReNew.
3. CPPIB considered both the Secondary Acquisition and Primary Acquisition as one combination (*i.e.* Transaction I) and gave a common Notice to the Commission. The Notice was given to the Commission only in respect of Transaction I pursuant to the execution of the share purchase agreement [**SPA**] for undertaking the Secondary Acquisition and a term sheet [**Term Sheet**] relating to the Primary Acquisition.



Based on the information provided by CPPIB, the Commission approved the above combination and Order in this regard was issued on dated 9th January, 2018.

Initiation of proceedings under Section 20(1) of the Act

4. Based on the press releases issued by ReNew and CPPIB, it was brought to the notice of the Commission that ReNew acquired Ostro [**Transaction II**] with the support of the investment made by CPPIB in ReNew. The relevant extracts of the press releases are as under:

- 4.1. Press release, dated 2nd April, 2018, issued by the ReNew:

“...ReNew Power, one of India’s leading clean energy companies, today announced the acquisition of Ostro Energy Private Limited.....”

Concurrent with this transaction, Canada Pension Plan Investment Board (CPPIB) is investing an additional US\$247 million to support ReNew Power’s financing for this acquisition. As a result, the CPPIB’s combined investment in ReNew Power now stands at US\$391 million, following an earlier investment of US\$ 144 million in January 2018....”

(emphasis added)

- 4.2. Press release, dated 3rd April, 2018, issued by the CPPIB:

“...CPPIB’s additional investment will support ReNew Power’s acquisition of Ostro Energy Private Limited (Ostro Energy), an Indian renewable energy developer with total capacity of more than 1,100 megawatts. With the acquisition of Ostro Energy’s assets, ReNew Power’s capacity will increase to more than 5,600 megawatts. Founded in 2011, ReNew Power is one of India’s leading clean energy companies with capacity diversified across wind, utility-scale solar and rooftop solar power-producing assets across India.

“We are pleased to further support ReNew Power in its latest acquisition, which further strengthens their position in India’s renewables sector. Our additional investment aligns well with CPPIB’s overall power and renewables strategy, providing greater diversification for the CPP Fund,” said Scott Lawrence, Managing Director, Head of Fundamental Equities, CPPIB. “As India’s demand for electricity increases, solar and wind are attractive sources of power. We congratulate ReNew Power on completing their significant acquisition and look forward to a long-term partnership with this highly experienced and proven management team. CPPIB will



continue to seek opportunities to expand our power and renewables portfolio as demand grows worldwide along the transition to renewables.”

(emphasis added)

5. Since no notice was given in respect of Transaction II nor any disclosure was made in that regard in the Combination Case bearing Registration No. C-2017/11/536, the Commission decided to initiate proceedings under Section 20(1) of the Act against CPPIB and ReNew. Accordingly, letters dated 20th September, 2018 were sent to them requiring to furnish necessary details about the impugned transactions. CPPIB filed its responses on 23rd October, 2018. ReNew filed its responses on 23rd October, 2018 and 26th October, 2018. Upon perusing these, further information was sought from them *vide* letters dated 1st November, 2018. CPPIB and ReNew filed their responses on 7th December, 2018 and 11th December, 2018 respectively including relevant email correspondence and internal reports /recommendations.

Notice under Regulation 48 of the Competition Commission of India (General) Regulations, 2009 read with Sections 43A and 44 of the Act:

6. Upon considering the e-mail correspondence between CPPIB and ReNew, internal reports/ recommendations of CPPIB, the above discussed press releases and other information provided, the Commission was of the *prima facie* view that CPPIB and ReNew failed to notify Transaction II in terms of Section 6(2) of the Act read with Regulations 5, 9(4) and 9(5) of the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Combinations Regulations, 2011 [**Combination Regulations**]. The Commission was of the further *prima facie* view that CPPIB suppressed and omitted to disclose the details of Transaction II to the Commission in Combination Registration No. C-2017/11/536.
7. Accordingly, separate notices dated 28th February, 2019 [**SCNs**] were issued to CPPIB and ReNew, under Regulation 48 of the Competition Commission of India (General) Regulations, 2009, to show cause, in writing, within fifteen days of receipt of the SCN as to why penalty in terms of Section 43A of the Act shall not be imposed on them and why they shall not be directed to file a notice with the Commission, in



respect of Transaction II, in terms of Regulation 8 of the Combination Regulations. CPPIB was additionally required to show cause as to why penalty shall not be imposed on it in terms of Section 44 of the Act.

8. Apart from the press releases discussed earlier, the other material relied upon in the SCN and relevant observations therein are reproduced as under:

(i) E-mails between CPPIB and ReNew:

<i>First e-mail chain</i>				
Date	Sender	Recipient	Subject	Content
8.09.17	CPPIB	ReNew	<i>Ostro Diligence</i>	[Redacted]
8.09.17	ReNew	CPPIB	<i>RE: Ostro Diligence</i>	[Redacted]
12.09.17 [00:21]	ReNew	CPPIB	<i>RE: Ostro Diligence</i>	[Redacted]
12.09.17	ReNew	CPPIB	<i>RE: Ostro Diligence</i>	[Redacted]

Source: Submissions of CPPIB. The senders and recipients of above mentioned emails are employees/ representatives of CPPIB and ReNew, acting on their behalf.
Note: Remarks within the square brackets and in bold characters are emphasis added

8.1. This e-mail chain shows that CPPIB was concerned about Ostro Diligence (*i.e.* due diligence relating to Transaction II) and wanted access to it even before starting the discussion regarding Term Sheet for Primary Acquisition Transaction I.



<i>Second e-mail chain</i>				
Date	Sender	Recipient	Subject	Content
27.11.17	CPPIB	ReNew	<i>Quick check-in</i>	[Redacted]
27.11.17	ReNew	CPPIB	<i>RE: Quick check-in</i>	[Redacted]
27.11.17	CPPIB	ReNew	<i>RE: Quick check-in</i>	[Redacted]
30.11.17	ReNew	CPPIB	<i>RE: Quick check-in</i>	[Redacted]
30.11.17	CPPIB	ReNew	<i>RE: Quick check-in</i>	[Redacted]

Source: Submissions of CPPIB. The senders and recipients of above mentioned emails are employees/ representatives of CPPIB and ReNew acting on their behalf.
Note: Note: Remarks within the square brackets and in bold characters are emphasis added

8.2. The second email chain shows that CPPIB went into a standby mode for share subscription in ReNew (i.e. Primary Acquisition in Transaction I), until the



certainty on valuation of Ostro for the purpose of Transaction II is reached. This is more evident when CPPIB tells ReNew, *vide* email dated 27th November, 2017, that [REDACTED] (emphasis added). This also shows that CPPIB and Renew had discussions to the effect that they would not start working on the SSA, for the purpose of Primary Acquisition in Transaction I, without alignment of valuation of Ostro in Transaction II. Such consensus between CPPIB and ReNew indicate the knowledge of CPPIB about Transaction II and its linkage with Transaction I. The linkage between Transaction I and Transaction II is also manifested when ReNew informs the valuation of Ostro to CPPIB on 30th November 2017 and in response, on the same day, CPPIB replies [REDACTED] and that CPPIB is happy to launch the share subscription process.

(ii) Documents considered by Investment Department Decision Committee of CPPIB

8.3. *Investment Recommendation dated 9th November, 2017 considered by CPPIB:* This document was considered by the Investment Department Decision Committee of CPPIB on 14th November, 2017. Upon such consideration, CPPIB approved the investment in ReNew by Fundamental Equities (FE), a Division of CPPIB. The relevant aspects of this document are summarised as under:

8.3.1. *“Recommendation: That Fundamental Equities (“FE”) invest upto [REDACTED] for upto [REDACTED] ownership of ReNew Power Ventures Pvt. Ltd. (“ReNew” or the “Company”) across two sleeves. Sleeve 1 involves acquisition of [REDACTED] shares for \$145 million from Asian Development Bank (“ADB”) at negotiated price (see Appendix 11.1), [REDACTED] Sleeve 2 involves investing up to an additional [REDACTED] to support the Company [ReNew] with acquisitions and/or to purchase shares from other investors”*

(emphasis added).



The recommendation shows that the second sleeve (*i.e.* Primary Acquisition) of the transaction is to fund acquisitions contemplated by ReNew.

- 8.3.2. ***“The Company has approached FE to support a transformational acquisition”***
(emphasis added)

This statement reiterates the fundamental purpose and objective of ReNew in entering into Primary Acquisition in Transaction I was to get financial support to undertake an acquisition which is transformational in nature.

- 8.3.3. ***“ReNew is in late-stage discussion to acquire Ostro Energy”***
(emphasis added)

This statement is a note to the table, on top 10 Wind and Solar Independent Power Producers (IPP). This again shows that CPPIB was not only aware of Transaction II at the time of evaluating the investment opportunity through Transaction I but it was also aware that discussion in that regard was in advance stage.

- 8.3.4. ***“Ostro Acquisition: At present, ReNew is in bilateral discussion to acquire a wind – focussed IPP with a total portfolio of 1.1 GW [REDACTED] The acquisition is expected to close by December, 2017 for an acquisition price of [REDACTED] (including the assumption of debt), representing a run – rate EV/EBITDA multiple of [REDACTED] (see Appendix 11.6: Summary of Acquisition). The Company has asked us to support the acquisition with a [REDACTED] equity investment”***
(emphasis added).

This further shows that the CPPIB’s Primary Acquisition in ReNew was to enable the latter’s acquisition of Ostro.



8.3.5. Item 6 of the Investment Recommendation on ‘*Company Valuation and Investment Returns*’ estimates the expected returns from the investment proposed in ReNew. The Internal Rate of Return (IRR) was also estimated on the basis of business operations of ReNew as well as Ostro. It has been specifically clarified in the notes to the Table on comparison of expected returns that ‘*Assuming the Company [ReNew] successfully completes Ostro acquisition with ██████ primary financing from CPPIB*’ (emphasis added). This along with the fact that ReNew asked CPPIB to support Ostro acquisition indicates that Transaction II was a certain consideration for both CPPIB and ReNew to contemplate and undertake the Primary Acquisition in Transaction I.

8.3.6. “11.6. Summary of proposed acquisition...11.6.1. ***Ostro Background and Transaction Matrix***...established in 2014, Ostro has 1108 MW of operational ██████ and under construction ██████ Note that the under-construction solar project will operational at closing. The projects have ██████ overlap with states where ReNew has operations and are diversified across OEMs (for wind projects) and off-takers. ██████ of Ostro Assets (higher than for ReNew) are facing higher credit quality, federal off-takers (NTPC and PTC)”

(emphasis added).

As per the submissions of CPPIB, ReNew contemplated many acquisitions at that point in time and all of them need not be disclosed in the Notice filed with the Commission. While no other potential acquisition by ReNew finds place in detailed Investment Recommendation of CPPIB, the Ostro Acquisition was discussed at length. This again shows the significance of Transaction II in pursuing Transaction I.

9. Based on the above, the SCNs came to the *prima facie* view that Transaction I and Transaction II are inter-connected. Further, CPPIB and ReNew, being the acquirer in Transaction II, are in contravention of the obligation contained in Section 6(2) of



the Act read with Regulations 5, 9(4) and 9(5) of the Combination Regulations. Since the facts and developments regarding Transaction II were material to Transaction I, the SCN issued to CPPIB noted that it suppressed and omitted to disclose the details of Transaction II to the Commission, at the time of notification of Transaction I.

10. In response to the notice of the Commission, CPPIB and ReNew filed their responses on 18th April, 2019 and 22nd April, 2019, respectively. Both of them also sought oral hearing before the Commission. Accordingly, the Commission heard both CPPIB and ReNew on 18th July, 2019, at length and allowed them to file further written submissions. CPPIB and ReNew filed their written submissions on 1st August, 2019.

Issues for determination:

11. The Commission has given careful consideration to the submissions of the parties, their oral and written arguments and other materials available on record. The issues that arise for determination of the Commission are as under:
 - 11.1. Whether Transaction I and Transaction II are inter-connected to each other and if so, whether CPPIB and Renew failed to give notice in respect of Transaction II, in terms of Section 6(2) of the Act read with Regulations 5, 9(4) and 9(5) of the Combination Regulations; and
 - 11.2. If the facts and developments regarding Transaction II are material to Transaction I, whether CPPIB omitted to disclose the same to the Commission, knowing it to be material.

A. Inter-connectedness of Transaction I and Transaction II

12. In response to the SCN, CPPIB raised preliminary objections, each of which is dealt below:
 - 12.1. CPPIB has contended that mere knowledge about potential acquisition of Ostro by ReNew (*i.e.* Transaction II) alone cannot imply inter-connection



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between Transaction I and Transaction II. Further, the SCN has failed to consider the serious policy implications of such an interpretation of ‘inter-connected’ transactions. A prudent investor would consider it routine, even mandatory, to secure knowledge of potential investment by the target company. However, each of such potential acquisition cannot be considered inter-connected to the investment into the target company.

- 12.2. The Commission notes that the impugned press releases and other material discussed above not only claims the knowledge of CPPIB about Transaction II but also that: (a) ReNew had approached CPPIB to seek financial support for acquiring Ostro; (b) CPPIB went into a standby mode and stalled the discussion on Primary Acquisition in Transaction I until certainty on Ostro valuation was reached and commenced the subscription process only thereafter; and (c) after the closing of Transaction II, CPPIB went public to state that its additional investment in ReNew (*i.e.* Primary Acquisition) was to support the latter to acquire Ostro. Based on these, the SCN *inter alia* states that CPPIB was not only aware of Transaction II but in fact, the Primary Acquisition in Transaction I was contemplated and pursued to facilitate funding to ReNew to support its acquisition of Ostro (*i.e.* Transaction II). Thus, it cannot be said that SCN sought to establish inter-connection between Transaction I and Transaction II merely based on the knowledge of CPPIB. Further, it is also not the case of SCN to make all and every potential acquisitions by target enterprise, as a part of the combination.
- 12.3. Placing reliance on the judgment of the Hon’ble Supreme Court in *Roop Kumar v. Mohan Thedani* [(2003) 6 SCC 595] and *Gangabai w/o Rambilas Gilda v. Chhabubai* [1982 SCR (1) 1176], CPPIB has argued that when there is a written agreement, the commercial understandings therein cannot be contradicted using other material. Thus, the press releases and internal communications cannot be considered to determine violation of Section 6(2) of the Act.



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- 12.4. The Commission observes that the above judgments cited by CPPIB relate to interpretation of contracts and the limitation on using extraneous aids/documents to contradict terms and conditions of a contract. However, the issue in the instant matter does not relate to interpretation of a contract. The focus of the instant proceedings is to determine whether Transaction I and Transaction II are inter-connected. This is a matter of economic reality to be gauged from the facts and circumstances of the case and cannot be limited to the written agreements between the parties. Thus the Commission is not limited by written contracts for the purpose of determining inter-connectedness between two transactions. Similar argument was taken before the Hon'ble Supreme Court in *Competition Commission of India v. Thomas Cook & Anr.* [Civil Appeal No.13578 of 2015]. It was the case of the Commission that market purchase of securities was connected to a share purchase under an agreement as well as a scheme of merger. The parties contented that the market purchases were not referred to in the said agreement and the scheme for merger and thus, the market purchases were independent of the other acquisition and merger. However, based on other material and circumstantial factors, the Hon'ble Supreme Court held that the market purchases, the other acquisition and the merger constitute one composite combination. In its judgment, the Apex Court specifically observed that '*Technical interpretation to isolate two different steps of transactions of a composite combination would be against the spirit and provisions of the Act.*'
- 12.5. CPPIB has submitted that the SCN selectively relies on certain documents while omitting others. Two documents furnished by CPPIB were stated to be disregarded: (a) ReNew Investment Presentation – shows that proceeds of Transaction I is not required for ReNew to acquire Ostro; and (b) minutes of CPPIB – shows the instance where funding was contingent upon subsequent acquisition – no such intention or arrangement is made by CPPIB in relation to Ostro acquisition. These submissions allude that the Primary Acquisition in Transaction I is not contingent upon Ostro acquisition.



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- 12.6. The Commission notes that while the above minutes and presentation may not reflect dependence between Transaction I and Transaction II, they do not, in any manner, go contrary to the facts and circumstances reflected in the press releases, e-mails and the Investment Recommendation of CPPIB, discussed in the SCN. If the circumstances otherwise show inter-connectedness between Transaction I and Transaction II, it is neither mandatory for CPPIB to record the inter-connectedness in its minutes nor essential that ReNew lacks independent financial strength to acquire Ostro. In simple terms, the issue is not whether ReNew could have acquired Ostro without funding from CPPIB. Instead, focus of the proceedings is to determine whether the Primary Acquisition in Transaction I was pursued to support Ostro Acquisition.
- 12.7. CPPIB has also contended that the SCN reflects a pre-determined mind on the issues and CPPIB ought to have been given opportunity of stating its case before coming to a conclusion.
- 12.8. On this issue, it is observed that if an SCN narrates a *prima facie* view on the violation of the provisions of the Act, based on material discussed therein, the same cannot be construed as pre-determined mind. To suggest pre-determined mind, CPPIB has argued that SCN chose to allege contravention ignoring the compelling alternative arguments summarised in para 12.5 above. Principles of taxation were referred to suggest that when two alternative arguments are available, the one favourable to the alleged wrongdoer must be adopted. However, the impugned issue does not relate to taxation or a contract. Even if the minutes of CPPIB and Investment Presentation (which purportedly show absence of inter-connection between the two transactions) are taken into consideration, the same do not make any alternative compelling argument as: (a) they do not negate the facts and circumstances indicated in the e-mails, internal considerations and press releases discussed earlier; and (b) these are neutral to the issue of inter-



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connectedness between Primary Acquisition in Transaction I and Ostro acquisition.

- 12.9. It is further observed that SCN is not a final determination by the Commission but only lays down the charges of contravention along with the basis, and calls for response on the alleged contraveners. SCN itself is an opportunity to CPPIB to present its case before final determination of the issues, by the Commission. Apart from the written response, the Commission has also heard CPPIB, at length, followed by its further written submissions. Thus, the Commission sees no merit on the issue of violation of the principles of natural justice.
13. Coming to the merits of the case, both ReNew and CPPIB have made similar arguments and submissions. The primary contention is that Transaction II does not meet the legal test of inter-connection under the Combination Regulations and the parameters prescribed by the Commission in *Thomas Cook* Case. CPPIB has contended that connected transactions must coalesce towards the common objective and such intention should be memorialised in a binding document. Further, notification to the Commission arises only upon execution of a binding document. At the time of notification of Transaction I, no binding document was entered into in respect of Ostro acquisition. Thus, there is no need to notify or report Transaction II to the Commission.
14. Before delving into the merits of these contentions of CPPIB and ReNew, it is pertinent to note the relevant provisions of the Act and the Combination Regulations. The Act envisages *ex-ante* regulation of combinations. Section 6(1) of the Act prohibits combination that causes or likely to cause appreciable adverse effect on competition. Section 6(2) of the Act obliges parties to give notice 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 earlier approval by the Commission. Thus, 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 in the relevant market(s)



and regulate them appropriately. If parties to the combination forfeit this statutory opportunity provided to the Commission, the same would attract penalty under Section 43A of Act.

15. Regulation 9(4) of the Combination Regulations states that “*Where the ultimate intended effect of a business transaction is achieved by way of a series of steps or smaller individual transactions which are inter-connected, one or more of which may amount to a combination, a single notice, covering all these transactions, shall be filed by the parties to the combination*”. This provision makes it mandatory for parties to combination to give one notice covering all inter-connected steps of their proposed combination. Further, Regulation 9(5) of the Combination Regulations provides that “*The requirement of filing notice under regulation 5 of these regulations shall be determined with respect to the substance of the transaction and any structure of the transaction(s), comprising a combination, that has the effect of avoiding notice in respect of the whole or a part of the combination shall be disregarded*”. As noted earlier, the Hon’ble Supreme Court in *Thomas Cook* case has clarified that technical interpretation to isolate two steps of the same combination would be contrary to the spirit and provisions of the Act.
16. CPPIB made reference to the decision of the Commission in *Thomas Cook* case to suggest that the following elements are essential to establish inter-connectedness: (i) the business and entities involved; (ii) simultaneity in negotiation, execution and consummation of the transactions; and (iii) whether it is practical and reasonable to isolate and view the transactions separately. However, the relevant portion of the said Order of the Commission states that: *It is observed that considering two different transactions as one combination depends on the **facts and circumstances of each case** with due regard to the subject matter of the transactions; the business and entities involved; simultaneity in negotiation, execution and consummation of the transactions; and also, whether it is practical and reasonable to isolate and view the transactions separately* (emphasis added). As may be seen, a holistic appreciation of the facts and circumstances of the given case would be relevant to determine inter-connectedness and isolated or piecemeal appreciation of specific facts or parameters may not yield any pragmatic conclusion. The specific elements



pointed out in said decision are only indicative in nature and are not mandatory/exhaustive conditions to establish inter-connectedness.

17. CPPIB has also submitted that to be inter-connected, one part of the transaction cannot be consummated without the other. However, in large part of inter-connected transactions one will follow the other. Just because the second transaction happens later, it cannot be argued that the same is not inter-connected, as the first transaction was consummated without the consummation of the second transaction. If such test of absolute dependence/ simultaneity is applied, it will lead to erroneous and impractical results and no inter-connection may be established ever.
18. On the issue of binding agreement not being in place for Transaction II, the Commission observes without doubt that binding document is the basis for notification of any combination under Section 6(2) of the Act. However, an inter-connected part of the combination cannot escape notification on the technical pretext that binding agreement has not been entered into for such inter-connected transaction. If one agrees otherwise, notification of a connected transaction can be avoided by just postponing the execution of the binding document for the inter-connected part. The Commission notes that CPPIB did not even whisper about Ostro acquisition in the notice filed under Section 6(2) of the Act, despite the same being an important consideration to pursue Transaction I. It is reiterated that the substance of a combination would guide the scope of the notification to Commission and as observed by the Hon'ble Supreme Court in *Thomas Cook* Case, technical interpretations to isolate two different steps of transactions of a composite combination would be against the spirit and provisions of the Act.
19. CPPIB has submitted that material on record shows that (i) ReNew was in the process of evaluating a number of M&A opportunities; (ii) ReNew had existing funds, as well as substantial lines of credit with several major banks and other lenders, for the purpose of acquiring up to [REDACTED] of projects (including Ostro, which is a 1,100 MW project); and (iii) ReNew's M&A strategy and acquisitions would have continued even without CPPIB's investment in ReNew.



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20. In this regard, it is relevant to note that the Investment Recommendation of CPPIB, while discussing Ostro Acquisition at length, specifically notes that “*The Company [ReNew] has asked us to support the acquisition [Ostro Acquisition] with a [REDACTED] equity investment*” (emphasis added). At another place, the same document states that “*Assuming the Company [ReNew] successfully completes Ostro acquisition with [REDACTED] primary financing from CPPIB*” (emphasis added). The case of SCN is that Primary Acquisition in Transaction I and Transaction II are connected. The SCN and the charges therein does not hinge upon whether ReNew would not have been able to acquire Ostro without the investment from CPPIB. If the above statements of CPPIB and other material discussed herein were to show inter-connectedness between Transaction I and Transaction II, the mere fact that ReNew had financial strength to acquire Ostro, even without Transaction I, would be of no help to break the link between Transaction I and Transaction II.
21. Further, the Investment Recommendations of CPPIB states that ReNew sought [REDACTED] investment for the purpose of Ostro Acquisition (*i.e.* Transaction II); whereas, the consideration to be paid by ReNew for Ostro Acquisition was more than [REDACTED]. Thus, the request of ReNew had been to seek partial funding from CPPIB for the purpose of Transaction II.
22. CPPIB has alleged that SCN mischaracterises the intention behind the Investment Recommendation by taking into consideration the IRR projections with and without Ostro. In this regard, the Commission notes that no other acquisition contemplated by ReNew at that time, except Transaction II (*i.e.* Ostro Acquisition), could find a place in the Investment Recommendation of CPPIB. Further, this aspect alone is not the basis of SCN to allege inter-connectedness. CPPIB and ReNew have given specific and separate arguments/ submissions as to why the different material relied upon in the SCN do not suggest inter-connection. Seen in isolation, no specific material/ facts can be conclusive of inter-connectedness or a violation of obligation under Section 6(2) of the Act but a holistic appreciation would be relevant.
23. The materials discussed in the SCN clearly show that: (a) the Investment Recommendation (which was the basis for CPPIB to approve Transaction I) records



that ReNew approached CPPIB to provide financial assistance to acquire Ostro and discusses Transaction II at length along with IRR projection of ReNew with and without Ostro; (b) no other acquisition contemplated by ReNew at that time, except Transaction II (*i.e.* Ostro Acquisition), could find a place in the Investment Recommendation of CPPIB; (c) the e-mail correspondence show that CPPIB required access to diligence materials relating to Ostro before entering into a term sheet for Primary Acquisition in Transaction I; and (d) the said e-mail further shows that as per consensus between CPPIB and ReNew, the former was in a standby mode with respect to the Primary Acquisition in Transaction I, till the alignment of valuation of Ostro. Further, the press releases issued by both ReNew and CPPIB further corroborate that Transaction I was contemplated and pursued to facilitate partial funding to ReNew to support its acquisition of Ostro (*i.e.* Transaction II). The primary rationale/ objective of Primary Acquisition in Transaction I had been to partially fund Transaction II. CPPIB nor ReNew has specifically disputed the contents of the impugned e-mails, internal reports/ considerations of CPPIB and the press releases. It has been rather claimed that the said material are extraneous to determine inter-connectedness and the same need to be established only through the binding agreements.

24. CPPIB and ReNew have contended that Transaction I and Transaction II are independent transactions on the basis of lack of simultaneity and parties being different. Pursuant to the hearing in the matter, CPPIB and ReNew have filed further written submissions summarizing their arguments/ contentions. CPPIB also furnished the timelines of various steps of Transaction I and Transaction II as well as the share prices of ReNew at different time period to support its case.

	Secondary Acquisition in Transaction I	Primary Acquisition in Transaction I	Ostro Acquisition (Transaction II)
Agreement	16.11.2017	14.03.2018	15.01.2018
Closing	31.01.2018	23.03.2018	28.03.2018

It is observed that CPPIB notified the Secondary and Primary Acquisitions in ReNew as one combination. However, it is interesting to note that timelines between these



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two legs of Transaction I was much wider than the time gap between Primary Acquisition in Transaction I and Transaction II. Similarly, on other parameters also, such as parties and objective, one may contend that Primary Acquisition in Transaction I is more integrally connected to Transaction II than the Secondary Acquisition. Seen in conjunction with the other material discussed herein, the Commission is of the view that Primary Acquisition in Transaction I and Transaction II were simultaneously negotiated and pursued. Further, Primary Acquisition in Transaction I was contemplated for the purpose of Transaction II. The share price details furnished by CPPIB also do not controvert the above discussed linkages between the Transaction I and Transaction II.

25. CPPIB has alluded that although in the beginning ReNew might have approached CPPIB to fund Ostro acquisition, the actual negotiation and outcomes need not necessarily be seen to connect Primary Acquisition in Transaction I and Transaction II. Further, the commercial negotiations, the initial objective of one party (especially an investee company) is frequently at wide variance with the objective and intention of the other, and is not necessarily the one on which negotiations are conducted and binding transaction documents executed. This may be the commercial reality in many cases. However, the impugned material and facts categorically show that: (a) ReNew approached CPPIB for part financial support to acquire Ostro; and (b) after the closing of Transaction II, both CPPIB and ReNew issued press releases stating that the Primary Acquisition in Transaction I is an investment by CPPIB in ReNew to support the acquisition of Ostro (*i.e.* Transaction II). Such connection from starting till the closing read with the impugned e-mails show that the Primary Acquisition in Transaction I was conceived, negotiated, contemplated and pursued in relation to Transaction II.
26. CPPIB has also objected to the reliance on press releases as the language therein is ambiguous, [REDACTED] and the same cannot be used to establish connection between Ostro acquisition (*i.e.* Transaction II) and Transaction 1. However CPPIB has neither clarified what is the purported ambiguity nor submitted that statements in the press releases are incorrect. In the absence of contesting the correctness of the facts contained in the press releases, the facts therein



are undisputed and will remain relevant. Just a bald request not to rely on the press releases cannot be a sufficient reason to discard them. It is also relevant to note that press releases was one of the material considered by the Supreme Court in *Thomas Cook Case* to understand the composite combination in that matter and the inter-connectedness between different transactions therein.

27. ReNew has further submitted that its acquisition of Ostro on a standalone basis is exempted from notification to the Commission in terms of the notification dated 27th March, 2017. The Commission does not see merit in this arguments as no part of a composite combination can be seen in isolation for the purpose of any exemption. This has also been clarified by the Hon'ble Supreme Court in *Thomas Cook Case*¹.
28. On a holistic appreciation of the facts and circumstances of the case particularly those revealed in the impugned e-mails, Investment Recommendation of CPPIB and press releases, the Commission concludes that Transaction II was not merely a matter of knowledge of CPPIB gained out of general due diligence but was one of its key considerations and also the rationale for contemplating Primary Acquisition in Transaction I. Thus, based on the material on record, the Commission concludes that Transaction I and Transaction II are inter-connected. Accordingly, CPPIB and ReNew, being Acquirers in Transaction II, failed to give notice in terms of Section 6(2) of the Act read with Regulations 5, 9(4) and 9(5) of the Combination Regulations, in respect of Transaction II.

B. Suppression and omission to disclose the details of Transaction II

29. Since the facts and developments regarding Transaction II are material to Transaction I, SCN noted that CPPIB appears to have suppressed and omitted to disclose the details of Transaction II to the Commission in Combination Reg. No. C-2017/11/536. Accordingly, CPPIB was required to show case as to why penalty shall not be imposed upon it in terms of Section 44 of the Act.

¹ Paragraph 30 of the case.



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30. CPPIB has submitted that Section 628 of Companies Act, 1956 is *pari materia* to Section 44 of the Act and *means rea* to wilfully omit a material fact is an essential element to prove contravention. *Arguendo*, it has also submitted that it had made full disclosure to the Commission Combination Reg. No. C-2017/11/536 and it does not have incentive to gain from a wilful omission.
31. The Commission observes that Section 628 of Companies Act, 1956 envisages imprisonment as a punishment and thus, is a penal provision. However, Section 44 does not entail penal consequences and only monetary penalties would be levied in case of contravention. While higher standard of proof is a requirement for penal proceedings, Section 44 proceedings may attract only civil liabilities.
32. While the above defences have been taken by CPPIB, it has not controverted the basis of *prima facie* determination in the SCN regarding the omission by CPPIB to disclose about Transaction II despite knowing it to be material.
33. In this regard, the Commission notes that: (a) ReNew approached CPPIB to provide funding to acquire Ostro and this acquisition has been claimed to as “a transformational acquisition”; (b) the Primary Acquisition in Transaction I was contemplated and pursued to support funding for Transaction II (*i.e.* Ostro Acquisition); (c) the evaluation of IRR by CPPIB for Transaction I was not limited to ReNew but is also inclusive of the business operations of Ostro, whose capacities were around █████ of the capacity of ReNew. Further, no other acquisition found a place in the Investment Recommendation of CPPIB despite the claim that ReNew contemplated several other acquisitions also; (d) the Investment Recommendation lists Ostro as one of the top ten IPP and was highlighted separately to signify its proposed acquisition by ReNew; (e) the Investment Recommendation further notes that “*The projects [of Ostro] have █████ overlap with states where ReNew has operations and are diversified across OEMs (for wind projects) and off-takers. █████ of Ostro Assets (higher than for ReNew) are facing higher credit quality, federal off-takers (NTPC and PTC)*” Such a fact of horizontal overlap is a relevant and material consideration from a competition perspective also; and (f) in its press release dated 3rd April, 2018 regarding Ostro acquisition by ReNew, CPPIB states that ‘...*We*



congratulate ReNew Power on completing their significant acquisition...' (emphasis added), which is also indicative of the fact that Ostro Acquisition was a material event.

34. These show that Transaction II and developments in that regard are material fact(s)/consideration in pursuing Primary Acquisition in Transaction I and such materiality was well within the knowledge of CPPIB.
35. CPPIB has contended that it had mentioned in the Notice that *“The proposed Transaction represents an opportunity for ReNew to enable smooth shareholder transition, and secure primary funding to leverage for growth and expansion plans.”*. This according to CPPIB amounts to full disclosure and thus, there was no suppression or omission on its part. The Commission notes that Form I under the Combination Regulations *inter alia* requires the notifying party to *“Please explain the purpose (including business objective and/or economic rationale for each of the parties to the combination and how are they intended to be achieved) of the combination”*. In spite of this requirement, no detail regarding Transaction II was disclosed to the Commission in the Form I filed by CPPIB in Combination Registration No. C-2017/11/536. Mere statement that Transaction I would secure primary funding to leverage the growth and expansion plans of ReNew cannot be taken as a disclosure about Transaction II. Such vague statements cannot meet the requirement to disclose material particular to the Commission. Having seen the extent of knowledge and the linkage between Primary Acquisition in Transaction I and Transaction II, CPPIB ought to have disclosed the details of Transaction II in the combination Notice filed for Transaction I. However, CPPIB having failed to do so, the Commission has no hesitation in concluding that CPPIB omitted to disclose a material particular, knowing it to be material.
36. In terms of Section 43A of the Act, if any person or enterprise fails to give notice under sub-section (2) of Section 6 of the Act, 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. In case of contravention under Section 44, the person shall be liable to a penalty which shall not be less than



rupees fifty lakhs but which may extend to rupees one crore, as may be determined by the Commission.

37. Though the penalty under sections 43A and 44 of the Act can be to the extent mentioned therein, 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. In the instant case, CPPIB and ReNew have extended cooperation in the inquiry and supplied requisite material/ documents in response to the information requirement of the Commission. Such material/ documents formed the basis of above findings of contravention. Considering these, the Commission considers it appropriate to impose a penalty of INR 50,00,000 (Rupees fifty lakh) on CPPIB. CPPIB shall pay the penalty within 60 days from the date of receipt of this Order.
38. The Secretary is directed to inform CPPIB and ReNew, accordingly.