12.03.2018

Notice given under Section 6(2) of the Competition Act, 2002 by
UltraTech Cement Limited: Combination Regn. No. C-2015/02/246

CORAM:

Mr. Devender Kumar Sikri
Chairperson

Mr. Sudhir Mital
Member

Mr. Augustine Peter
Member

Mr. U. C. Nahta
Member

Mr. G. P. Mittal
Member

Appearances during Oral hearing on 03.10.2017 for UltraTech Cement Limited:

Mr. Somasekhar Sundaresan, Advocate, Ms Nisha Kaur Uberoi, Advocate, Ms Soumya Hariharan, Advocate, Mr Saksham Dhingra, Advocate, Ms Nandini Pahari, Advocate, Mr. Puneet Bansal, General Counsel, UltraTech, Mr. Paresh Thakker, General Counsel, UltraTech

Order under Section 44 of the Competition Act, 2002

A. Background

1. On 17.02.2015, the Competition Commission of India (hereinafter referred to as the **"Commission"**) received a notice ("**Notice**"), under Section 6(2) of the Competition Act, 2002 ("**Act**"), filed by UltraTech Cement Limited ("**UltraTech**"/ "**Acquirer**"). The notice of combination was given pursuant to execution of an Implementation Agreement between

UltraTech and Jaiprakash Associates Limited ("**JAL**"/ "**Seller**") on 23.01.2015 ("**IA**") (hereinafter UltraTech and JAL are collectively referred to as the "**Parties**"). The combination related to transfer of business, assets and operations of two cement plants owned by JAL (including captive power plants) located at Bela and Sidhi in Madhya Pradesh ("**Target Assets**") to UltraTech on a going concern and slump exchange basis, through a scheme of arrangement under Section 391 to Section 394 of the erstwhile Companies Act, 1956 ("**Combination**"). On 10.04.2015, the Commission approved the Combination by passing an order under Section 31(1) of the Act ("**Order**"), without prejudice to proceedings under Section 43A of the Act.

2. During the review of the Combination, the Commission noted that the Acquirer had provided a corporate guarantee to Axis Bank Limited ("**Axis Bank**") in favour of JAL on the basis of which Axis Bank had advanced a loan of INR 500 Crores to JAL. Accordingly, a show cause notice under Section 43A of the Act read with Regulation 48 of the Competition Commission of India (General) Regulations, 2009 ("**General Regulations**") was issued to the Acquirer on 23.04.2015. The SCN required the Acquirer to show cause, in writing, within 15 days of receipt of the same, as to why penalty, in terms of Section 43A of the Act, should not be imposed on it for failure to file notice of the Combination in accordance with Section 6(2) of the Act. The Acquirer filed its reply to the SCN on 22.05.2015 ("**Response to S. 43A SCN**") along with a request for oral hearing, in terms of Regulation 48 of the General Regulations.

B. Initiation of proceedings under Section 44 of the Act

3. While reviewing the Response to S. 43A SCN, the Commission observed that the companies owned/controlled, directly or indirectly, by Mr. Kumar Mangalam Birla and his family members ("**KM Family**") own substantial shareholding in Century Textiles and Industries ("**Century**") and Kesoram Industries ("**Kesoram**"), both of which are engaged in the production and sale of cement in India. The Commission also observed that certain news reports highlighted that though Mr. B. K. Birla is the chairman of Century, it is Mr. Kumar Mangalam Birla, who has chaired the board meetings of Century for the last few years. The

Commission further observed that Mr. Kumar Mangalam Birla is a Director of both UltraTech and Century and Ms Rajashree Birla (mother of Mr. Kumar Mangalam Birla) is a Director of UltraTech and Additional Director of Century.

4. The Commission noted that while filing the Notice, UltraTech had reported that it is a subsidiary of Grasim Industries Limited ("**Grasim**") which in turn is a flagship company of Aditya Birla Group. Accordingly, in response to question 8.5 of Form II, which seeks information regarding the group to which the target entity/assets would belong after the combination, it was stated that the group, for the purposes of the Act would comprise of Grasim and all enterprises controlled by it. Accordingly, in response to question 9.1 of Form II, which seeks a list of all the enterprises belonging to the same group as each of the parties to the combination and a list of all the enterprise(s) controlling the parties to the combination, directly or indirectly, along with the nature and means of control, a list of all enterprises belonging to Grasim was provided.

5. The Commission observed that UltraTech did not provide any details in respect of shareholding/control of KM Family and the companies owned/controlled by it in Century and Kesoram. The Commission noted that the said information was material as Century was active in the relevant market considered for assessment of the Combination and therefore it appeared that UltraTech had omitted to provide material information relating to shareholding/control of KM Family and the companies owned controlled by it in Century and Kesoram. The Commission further noted that the Acquirer had indicated Century as its competitor, which appeared to be factually incorrect.

6. Accordingly, a show cause notice was issued to UltraTech on 08.01.2016 under Section 44 of the Act read with Regulation 48 of the General Regulations ("**S. 44 SCN**") for failing to provide information regarding shareholding/control of KM Family and companies owned/controlled by it in Century and Kesoram and making a factually incorrect submission indicating Century as UltraTech's competitor. The Acquirer filed its reply to the S. 44 SCN on 26.02.2016, after seeking extension of time. The Acquirer made certain additional submissions in this regard on 01.07.2016 and 26.07.2016 during the review of another

transaction involving the Parties which was assigned Combination Regn. No. C-2016/04/394.

7. On 17.08.2016, UltraTech made an application for inspection of documents/records relating to the proceedings. The Commission granted the inspection request and the same was conducted on 27.09.2016. After the inspection, UltraTech submitted a fresh response on 26.10.2016 superseding its earlier response and requested the Commission to refer to the same as comprehensive and complete response to S. 44 SCN along with a request for oral hearing ("**Response to S. 44 SCN**").

8. In its meeting held on 25.08.2017, the Commission considered the Response to S. 44 SCN and decided to grant an oral hearing to the Acquirer. Accordingly, the Acquirer presented its case before the Commission on 03.10.2017 and also made written submissions on the same date.

C. Submissions of the Acquirer

9. In the Response to S. 44 SCN and during oral submissions, UltraTech contended the following:

Proceedings should abate as the transaction has been abandoned

9.1. That due to legal impediments arising out of amendments in the provisions of Mines and Minerals (Development and Regulation) Act, 1947, the Combination has been abandoned. This was intimated to the Commission on 29.02.2016. Accordingly, any proceedings arising from the transactions in respect of which approval was obtained should abate after the transaction stands abandoned.

Neither Mr. Kumar Mangalam Birla nor his family members directly or indirectly control Century and Kesoram

9.2. That as per the definition contained in explanation (b) to Section 5 of the Act, 'group' means,

" two or more enterprises which, directly or indirectly, are in a position to —
(i) exercise twenty-six per cent[1] or more of the voting rights in the other enterprise; or
(ii) appoint more than fifty per cent of the members of the board of directors in the other enterprise; or
(iii) control the management or affairs of the other enterprise.".

9.3. The Commission has considered KM Family to constitute a 'group' while the definition of 'group' under the Act does not bring within its ambit members of a 'family' and the term 'family' is not defined in the Act. S. 44 SCN has attempted to go beyond the Act, which does not contemplate that control should be inferred from involvement, however, token or miniscule, of a 'family'. Notwithstanding the aforesaid, UltraTech is submitting Response to S. 44 SCN by including shareholdings of KM Family, which is defined to include Mr. Kumar Mangalam Birla (Self), Ms. Rajashree Birla (Mother), Ms. Neerja Birla (Wife), Ms. Ananyashree Birla (Daughter), Mr. Aryaman Vikram Birla (Son) and Ms. Advaitesha Birla (Daughter).

9.4. KM Family and the entities owned/controlled by it do not hold more than 50 percent shareholding in either Century or Kesoram. KM Family and the entities owned/controlled by it hold, directly or indirectly, shares to the extent of […] percent at best and […] percent at worst in Century and […] percent at best and […] percent at worst in Kesoram. The 'at worst' estimates of shareholding have been computed considering indirect beneficial interest and 'at best' estimate of shareholding is computed by reckoning the extent of indirect control over voting rights which would

[1] Increased to fifty percent by GOI notification

lead to control. Based on the aforesaid, regardless of the approach followed, the first limb of the definition of 'group' is not satisfied.

9.5. As regards the ability to appoint more than fifty percent of the Board of Directors, at the time of filing of the Notice, Mr. Kumar Mangalam Birla was the only common director on the Board of UltraTech and Century (out of a Board of 14 and 8 directors respectively). Mr. Kumar Mangalam Birla neither had a casting vote as on the date of filing the Notice nor has a casting vote as on date. Ms Rajashree Birla was appointed as a Director on the Board of Century on 05.05.2015 (*i.e.* subsequent to the date of the Order). Further, Mr.Kumar Mangalam Birla and Ms Rajashree Birla together are but two Directors out of total strength of eight Board seats of Century and do not constitute majority. As regards chairing of meetings, Mr. Kumar Mangalam Birla has chaired only 4 out of a total of 20 Board meetings of Century held from FY 2012-13 till date. His role is limited to participating in the meetings for broad and high level discussion on policy issues. Also, being the Chairman in a Board Meeting does not confer upon the Chairman any additional powers or special rights to indicate that such person controls the affairs and management of a company – it is primarily a position occupied to ensure the conduct of the meeting smoothly and maintain the decorum and discipline at the meeting. In relation to Kesoram, UltraTech clarified that no member of KM Family is a Director on the Board of Kesoram. Based on the aforesaid, the second limb of the definition of 'group' in terms of ability to control majority of composition of Board of Directors is also not satisfied.

9.6. As regards the third limb of the definition of 'group' given in the Act in terms of ability to control the management or affairs, KM Family does not have any special rights or veto rights in relation to Century or Kesoram which can be viewed as 'control' for the purposes of the Act.

9.7. The Acquirer also made a reference to another case involving KM Family, *i.e.*, the ABCIL-Grasim Combination Case C-2015/03/256 in which the notice was filed by Grasim and Aditya Birla Chemicals (India) Limited ("**ABCIL**"). In the said case, the

parties had submitted that both Grasim and ABCIL belong to Aditya Birla Group. In this regard, it has been submitted that the Commission had considered Grasim and ABCIL to be part of the same group, *inter-alia*, based on factors such as (i) decisive influence exercised by Mr. Kumar Mangalam Birla, his family and the entities owned/controlled by them over both Grasim and ABCIL; (ii) common management level employees; (iii) common procurement, marketing and logistics teams; (iv) common logo *etc*. In context of the comparison of ABCIL-Grasim Combination Case with the instant case, UltraTech submitted that KM Family and entities owned/controlled by it do not fulfil the criteria in relation to Century and Kesoram.

UltraTech provided all information required to be disclosed

9.8. That in light of the issues contained in S. 44 SCN, relevant questions pertaining to disclosure of shareholding and control are questions 9.1 to 9.3 of Form II, the requirements of which are as under:

i. *Question 9.1 of Form II - A list of all the enterprises belonging to the same group for each of the parties to the combination, and list all the enterprise(s) controlling the parties to the combination, directly or indirectly, along with the nature and means of control;*

ii. *Question 9.2 of Form II - Whether the parties to the combination, either singly or jointly, directly or indirectly, control the affairs or management of another entity or group? If yes, please furnish the following:*

A. details of enterprise(s) exercising control and enterprise(s) whose affairs are being controlled;

B. form and manner in which the control is exercised; and

C. details of common directors/ partners/ coparcenors/ trustees; and

iii. Question 9.3 of Form II - Whether the parties to the combination and another enterprise or group referred to at 9.1 and 9.2 above, are engaged in production, distribution or trading of similar or identical or substitutable products or provision of similar/identical/substitutable services. If yes, provide following details:

A. Names of similar or identical or substitutable products or services; and

B. Market share of each of the products or services mentioned in (a) above, prior to and after the combination.

9.9. Question 9.1 of Form II categorically requires information pertaining to a list of enterprises which belong to the same 'group' as that of the parties. UltraTech belongs to Grasim as Grasim is a listed entity with a dispersed shareholding (and Grasim's promoter group itself holding only 25.51 percent in Grasim as on the date of filing of the Notice). No further enterprise above Grasim can be classified as constituting a 'group' for the purpose of Section 5 of the Act and Question 9.1 of Form II. Accordingly, UltraTech furnished all the information in response to Question 9.1 of Form II with regard to Grasim.

9.10. In relation to Questions 9.2 and 9.3 of Form II, as the information is required only in relation to the parties to the combination, information has been limited to Grasim, UltraTech and JAL and the entities controlled by Grasim, UltraTech and JAL.

9.11. It has also been submitted that UltraTech would have been more than willing to fully furnish details regarding minority non-controlling shareholdings of KM Family or any other shareholder in the event the Commission had indicated that it required more information for assessment. Further, details of Grasim's shareholding, including its promoters and promoter group is available in the public domain (given that shares of

Grasim are listed on BSE Limited and National Stock Exchange of India Limited) and the same have also been submitted to the Commission as part of the Notice.

9.12. Based on the above mentioned submissions, UltraTech has stated that it has made full and complete disclosures in conformity with the letter and spirit of the law and has not omitted to provide any information, material or otherwise, in relation to any of the questions in Form II template or sought by way of the request for information letters.

News reports cannot be the basis for adverse findings

9.13. That news reports relating to 'Century cementing ties with UltraTech' have been denied by UltraTech and Century by way of letters to the stock exchanges. Also, newspaper reports cannot be considered as evidence. In light of the above, newspaper reports relied upon by the Commission cannot be the basis for arriving at adverse findings against UltraTech.

Non provision of internal documents for inspection

9.14. That S. 44 SCN indicated that Century is active in the State where the Target Assets are located and held around […] percent share in terms of installed capacity in the relevant market delineated during the assessment of the Combination. UltraTech has submitted that the internal assessment of the Commission was not made available to it for inspection and the same needs to be provided to enable it to establish a full and fair defence and in accordance with the principles of natural justice.

9.15. Hence, UltraTech has not contravened any provisions of the Act. Without prejudice to the above, Mr. Kumar Mangalam Birla is willing to volunteer to the Commission that he would be happy to resign immediately from the Board of Century in order to avoid the above concerns of the Commission.

D. Analysis and Findings of the Commission

10. The subject matter of S. 44 SCN is that KM Family and the entities owned/controlled by it have shareholding/control in UltraTech as well as in Century and Kesoram which are also engaged in the same product space as UltraTech and the said details were omitted to be provided in the Notice by the Acquirer and instead Century was indicated as a competitor of UltraTech.

11. At the outset, it would be appropriate to highlight the significance of shareholding in competitors from competition perspective. It may be noted that there is a strong rationale for considering the shareholding in competitors in competition assessment, whether controlling or non-controlling. The are two prominent theories of harm as identified in the EC White Paper towards effective merger control which may result from the acquisition of non-controlling minority shareholding.

(a) Non-coordinated anti-competitive effects: "*Acquiring a minority shareholding in a competitor may lead to non-coordinated anticompetitive effects because such a shareholding may increase the acquirer's incentive and ability to unilaterally raise prices or restrict output. If a firm has a financial interest in its competitor's profits, it may decide to 'internalise' the increase in those profits, resulting from a reduction in its own output or an increase in its own prices.*" (at paragraph 29); and

(b) Horizontal coordinated anti-competitive effects: "*Minority shareholdings in competitors may also lead to coordinated anti-competitive effects by impacting a market participant's ability and incentive to tacitly or explicitly coordinate in order to achieve supra-competitive profits. The acquisition of a minority shareholding may enhance transparency due to the privileged view it offers the acquirer into the commercial activities of the target."* (at paragraph 35).

12. In this backdrop, the Commission has considered the submissions of the Acquirer.

Abatement of proceedings because of non-consummation of the Combination

12.1. S. 44 SCN issued to UltraTech relates to omission to file material information and making an incorrect statement in the Notice. The parties to a combination are required to provide complete and correct information on all the aspects asked for in the designated form for filing of notice. The competition assessment undertaken and consequent decision of the Commission is primarily based on the information provided in the notice. Once the Commission has passed an order, it has no control on the subsequent consummation or non-consummation of a transaction and may only be left with the option of revoking the decision in the event it comes to know that the information was either incomplete or incorrect. Thus, the fact of non-consummation of the Combination cannot be considered to be relevant to the proceedings initiated under Section 43A or Section 44 of the Act and the same cannot be abated. The submissions of UltraTech in this regard are not tenable and hence, rejected.

Consideration of shareholding of family members

12.2. The Acquirer has submitted that the definition of 'group' under the Act does not bring members of a 'family' within its ambit and that 'family' has not been defined in the Act. In this regard, it may be noted that what is of the essence here is collective common control of certain individuals and enterprises over an enterprise; the individuals may or may not comprise a family. The assessment of common control has been an integral part of the decisional practice of the Commission as detailed hereunder.

12.3. The Commission, *vide* its order dated 28.01.2015, in a combination notice given by various Nirma entities (C-2014/11/221) observed that:

"…from the information given in the notice and other material available on record that ultimate control over the business activities of Nirma, BHPL, KHPL, Kulgam, LHPL,

UHPL and KCPPL, both before and after the combination remains with the promoter, Shri. Karsanbhai K. Patel, through the shareholding in various capacities and through the immediate family members."

"... In view of the foregoing, the proposed combination is not likely to have any adverse effect on competition in India."

12.4. Similarly, the Commission, *vide* its order dated 04.09.2014 in a combination notice given by various Zuari entities (C-2014/06/181), observed that

"Further, considering the common promoter shareholding and presence of common directors in ZACL, Zuari Global Limited (a holding company of ZACL) and Chambal Fertilisers and Chemicals Ltd. ("Chambal"), for the purpose of competition assessment of the proposed combination, the market shares of Chambal in respect of relevant products have been ascribed to those of the Parties."

12.5. It is pertinent to note that the Aditya Birla Conglomerate itself sought to benefit from the aforesaid competition assessment approach in the ABCIL Grasim Combination Case. Contrary to the submissions made in Response to S. 44 SCN that there is no enterprise above Grasim that could be classified as constituting a 'group', it was submitted in the ABCIL-Grasim case that Grasim and ABCIL belong to the Aditya Birla Group. The Aditya Birla Group as considered by the parties in the said case collectively included the KM Family and enterprises owned/controlled by it. As a factor in competition assessment, submissions were made regarding the decisive influence of KM Family and enterprises/owned controlled by it. In this regard, the parties in the said case submitted a certificate according to which KM Family, directly or indirectly, owns/controls certain companies namely […]. The combined shareholding of KM Family and aforesaid entities said to be owned/controlled by them is around 25.45 percent in Grasim and 34.59 percent in Hindalco. It was further submitted that since KM Family and entities controlled by it constitute the single largest shareholder group in

both ABCIL and Grasim and other shareholders are dispersed, they have the ability to exercise decisive influence over ABCIL and Grasim.

12.6. S. 44 SCN is based on the very facts and basis on which the parties sought the approval of the Commission in ABCIL-Grasim Combination Case. The Commission has considered the shareholding of KM Family and the same entities which were said to be owned/controlled by KM Family in Century and Kesoram. In fact the shareholding of KM Family and enterprises owned/controlled by them in Century exceeds their shareholding in Grasim and Hindalco. Taken together, these shareholders held around […] percent shares in Century and […] percent shares in Kesoram as on 31.12.2014.

12.7. In view of the aforesaid observations on the relevance of common control of individuals/enterprises in competition assessment and specific submission of the parties in ABCIL-Grasim Combination Case, the Commission observes that submissions of the Acquirer are contradictory and cannot be considered as tenable.

Issue of control of KM Family and enterprises/owned controlled by them over Century and Kesoram

12.8. As regards the issue of control over Century and Kesoram, the Acquirer has made reference to the three limbs of definition of 'group' as contained in explanation (b) to Section 5 of the Act. The Commission observes that the first test of the two enterprises belonging to the same group is the ability to exercise 50 percent or more voting rights; the second test is in terms of ability to control majority of composition of Board of Directors; and the third test, which is most dynamic, is in terms of ability to control or manage the affairs of the other enterprise.

12.9. The Acquirer has submitted that the Act does not intend to envisage control with shareholding less than 50 percent. In this regard, it is noted that the three limbs are 'either/or' tests and fulfilment of even a single limb would confer control. For example, if a particular enterprise does not hold 50 percent shares in the other enterprise, it may

still have the ability to control if it has majority on the Board of Directors. Similarly, in the event, an enterprise does not have requisite shareholding nor the ability to control majority composition of the Board of Directors, it is possible to infer control by virtue of ability to control and manage the affairs of the other enterprise. The Commission observes that as pointed out by the Acquirer, ability to manage the affairs of the other enterprise may be inferred from special rights/veto rights. However, special rights/veto rights are not the only basis for inferring the ability to manage/control the affairs of an enterprise and there can be other sources of control as well *viz.*, status and expertise of an enterprise or person, Board representation, structural/financial arrangements *etc.* In competition law practice, control is considered as a matter of degree. However, all degrees and forms of control nonetheless constitute control. The international jurisprudence considers 'material influence' as the lowest form of control with other higher forms such as *de facto* control and controlling interest (*de jure* control) in that order.

12.10. Material influence, the lowest level of control, implies presence of factors which give an enterprise ability to influence affairs and management of the other enterprise including factors such as shareholding, special rights, status and expertise of an enterprise or person, Board representation, structural/financial arrangements *etc. De facto* control implies a situation where an enterprise holds less than majority of the voting rights, but in practice controls over more than half of the votes actually cast at a meeting. Further, the factors relevant for material influence are relevant for ascertaining *de facto* control as well. It may be noted that the concepts of material influence and *de facto* control are very significant in competition law as there can be situations where the commercial realities can be more telling than the formal agreements and structures. Controlling interest or *de jure* control means a shareholding conferring more than 50 percent of the voting rights of an enterprise. It may be noted that only one enterprise can have a controlling interest in the other enterprise but more than one enterprise can control the other enterprise (situation of joint control). Likewise, there are other terms which are used to express control such as negative control (by virtue of ability to block special resolutions) or operational control (by virtue of commercial cooperation

agreements with or without involving equity). Thus, while examining the third limb of the definition of group, regard needs to be given to the likelihood of the aforesaid degrees of control and not just the special rights as considered by the Acquirer.

12.11. As stated earlier, in the instant case, going by the certificate submitted by Aditya Birla Group in ABCIL-Grasim Case, the shareholding of KM Family and enterprises owned/controlled by them is around […] percent in Century and […] percent in Kesoram, which definitely gives them the ability to exercise negative control by virtue of their shareholding itself. The Acquirer has made submissions regarding the 'at best' and 'at worst' estimates of shareholding based on ability to exercise indirect control and beneficial interest respectively. However, going by the certificate submitted in ABCIL-Grasim Case which categorically states that the enterprises listed therein are 'owned/controlled by KM Family', it is reasonable to consider the entire shareholding of such enterprises in Century and Kesoram and the same would be consistent with the indirect control approach used by the Acquirer for arriving at 'at best' estimates of shareholding.

12.12. The second limb considers determination of control based on the ability to control majority of composition of the Board of Directors. Accordingly, it may be inferred that if an enterprise has the ability to control the majority of composition of the Board of Directors, it may have outright control, however, even if there is no ability to control majority of the Board composition, the enterprise(s) may have material influence over the affairs of the other enterprise.

12.13. Mr. Kumar Mangalam Birla, as per the submissions of the Acquirer, occupied 1 seat on the Board of Directors of Century while also being on the Board of UltraTech at the time of filing the Notice, and he chaired 4 out of a total of 20 Board meetings of Century held from the financial year 2012-13 till date. The same may have led to material influence of Mr. Kumar Mangalam Birla over the affairs of Century. As regards the significance of individual investor, reference may be made to the decisional practice in

the United Kingdom. The guidance on the UK CMA's jurisdiction and procedure states at paragraph 4.28 that "*merger arrangements may give rise to a position of 'de facto' control…might also involve situations where an investor's industry expertise leads to its advice being followed to a greater extent than its shareholding would seem to warrant*". Though a determinative finding on the same may need more examination of the commercial realities, the same is not required at this stage considering that S. 44 SCN is on the aspect of omission to provide material information and therefore the aforesaid assessment is only aimed to highlight the materiality of the information omitted. Further, even in the absence of any material influence, being on the Board of a competitor allows access to competitively sensitive information which can facilitate tacit collusion. UltraTech has itself submitted that the role of Mr. Kumar Magalam Birla is limited to participating in the meetings for broad and high level discussion on policy issues. This aspect in itself highlights the fact that a single Board seat is also highly relevant to competition assessment and needs to be disclosed by the parties.

12.14. Apart from the aforesaid degrees of control, the Commission by way of its decisional practice and specific provision in the Combination Regulations, has elaborated on the shareholding in the ordinary course of business or solely as an investment. The Commission *vide* its order dated 10.11.2014 in a combination notice filed by New Moon B.V. ("**New Moon Case**") C-2014-08-202, held:

"an acquisition of shares or voting rights, even if it is of less than 25 per cent, may raise competition concerns if the acquirer and the target are either engaged in business of substitutable products/services or are engaged in activities at different stages or levels of the production chain. Such acquisitions need not necessarily be termed as an acquisition made solely as an investment or in the ordinary course of business, and thus would require competition assessment, on a case to case basis, under the relevant provisions of the Act."

12.15. Though the aforesaid decision is in context of acquisition of shares and notifiability of a transaction, the same is applicable in equal measure on existing shareholdings for the

purpose of competition assessment. Following the reasons detailed in the New Moon Case, if any enterprise holds/acquires shares in a competitor or a market player engaged in activities at different stages of production chain, such existing shareholding cannot be considered as in ordinary course of business/solely as an investment and therefore the parties are expected to disclose details of such shareholdings in the notice. Considering that this decision of the Commission pre-dates the Combination, the Acquirer should have been aware of the same and filed all the requisite details. Notwithstanding the findings of the Commission as regards shareholding of KM Family and enterprises owned/controlled by them leading to negative control, the Acquirer was under an obligation to disclose the details of shareholding in accordance with the New Moon Case even if its 'at best' and 'at worst' shareholding estimates are considered as valid.

12.16. The Commission observes that Item 1 of Schedule I of the Combination Regulations also contains provisions relating to ordinary course of business or solely as an investment. It provides that acquisition of less than 25 percent of shares/voting rights solely as an investment or in the ordinary course of business may not require notification as the same is not ordinarily likely to raise any concerns of AAEC. In 2016, the same was amended to include an explanation as to what constitutes solely as an investment. As per the said explanation, the acquisition of less than 10 percent of share capital/voting rights may be treated as solely as an investment if (a) the investor does not have any special rights; and (b) the investor is not a member of the Board of Directors of the target. Though, as on the date of alleged omission, the only decision relevant was New Moon B.V. as per which investment in competitor could not be considered as in the ordinary course of business/solely as an investment, even if the subsequent clarification in Combination Regulations is considered, the shareholding of KM Family and entities owned/controlled by it in Century would still not be solely as an investment regardless of the extent of shareholding because of presence of Mr. Kumar Mangalam Birla on the Board of Century. Thus, even if UltraTech's own estimates of shareholding are considered, the same can still not be considered as in the ordinary course of business or solely as an investment.

12.17. Thus, based on the aforesaid examination of facts, the Commission observes that:

i. As per the own submissions of UltraTech, KM Family and entities owned/controlled by it held, directly or indirectly, shareholding of […] percent at best and […] percent at worst in Century and […] percent at best and […] percent at worst in Kesoram. As per the Commission's assessment based on certificate submitted by the parties in the ABCIL-Grasim Combination Case, the shareholding of KM Family and entities owned/controlled by it appears to be around […] percent in Century and […] percent in Kesoram which may confer negative control upon KM Family together with the entities owned/controlled by it over Century and Kesoram. Further, even going by shareholding admitted by the Acquirer, it may be inferred on the basis of New Moon B.V. decision that such shareholding is strategic and cannot be said to be in the ordinary course of business. Also, the shareholding remains strategic even considering the explanation given in the Combination Regulations due to Board presence of Mr. Kumar Mangalam Birla; and

ii. With the presence of Mr. Kumar Mangalam Birla on Board of Century, likelihood of material influence of Mr. Kumar Mangalam Birla over Century and competition distortions from access to competitively sensitive information cannot be ruled out.

12.18. Based on the aforesaid observations, the Commission is of the opinion that the criticality of information omitted to be provided by UltraTech, which was the subject matter of Section 44 proceedings, is established and in view of that, determinative findings particularly on the aspect of control are not required.

Whether UltraTech provided all the information required by the Act?

12.19. The Commission observes that even considering the submissions of the Acquirer regarding defining 'group' at the level of Grasim, it was under obligation to provide details of shareholding of promoters of Grasim particularly when such shareholding was in a competitor. Question 9.1 of Form II categorically requires:

"a list of all the enterprises belonging to the same group for each of the parties to the combination, and list all the enterprise(s) controlling the parties to the combination, directly or indirectly, along with the nature and means of control".

The Acquirer while detailing the requirements of question 9.1 deliberately focussed on the first part, *i.e.*, a list of all enterprises belonging to the same group for each of the parties to the combination. The Acquirer has submitted that as it considered Grasim as constituting 'group' to which UltraTech belonged, it accordingly provided details of Grasim. The Commission notes that the Acquirer has omitted the information required by the second part, which requires a list of all the enterprise(s) controlling the parties to the combination, directly or indirectly, along with the nature and means of control. This part clearly brings out that the Act envisages likelihood of control of an enterprise by more than one enterprise and also requires information as regards such enterprises, who basically would be the promoters. Thus, as per the requirements of question 9.1 of Form II, the Acquirer was under an obligation to provide a list of all the promoters of Grasim who directly or indirectly control UltraTech.

12.20. Question 9.3 of Form II requires:

"Whether the parties to the combination and another enterprise or group referred to at 9.1 and 9.2 above, are engaged in production, distribution or trading of similar or identical or substitutable products or provisions of similar/identical or substitutable products. If yes, provide following details:

A. Names of similar or identical or substitutable products or services; and

B. Market share of each of the products or services mentioned in (a) above, prior to and after the combination."

It may be noted that question 9.3 requires market information not only of the parties to the combination but also 'another enterprise or group referred to at questions 9.1 and 9.2'. Thus, had the Acquirer provided complete details of question 9.1, it would have been required to provide details of market share *etc*. in respect of any overlaps that may have arisen at the level of promoters of Grasim. These overlaps would have related to cement because of shareholding of promoters of Grasim in Century and Kesoram and the Acquirer would have been required to provide the details of the same.

12.21. Further, it may also be noted that as per question 13 to Form II, *"the parties to the combination are also encouraged to submit any other information that they believe could assist the Commission in assessing the proposed combination and the markets involved"*. Considering the aforesaid discussions on materiality of the information and the fact that the Aditya Birla Group has made submissions regarding the decisive influence of promoter group in ABCIL/Grasim case believing that it would have had a material impact on the assessment of the proposed combination, it was incumbent on the Acquirer to furnish such details in this case as well.

12.22. As regards the submissions of UltraTech that it would have been willing to provide information if the Commission had asked for the same during the review process, it may be noted that the parties to the combination are better placed to identify and provide complete information which is relevant for competition assessment themselves. The Commission cannot foresee various possible structural relationships of the parties to the combination and the statement made by UltraTech that Century is a competitor obviated the need for the Commission to scrutinise the shareholding pattern of Century. The

possibility that the Commission can seek any information does not absolve UltraTech of its obligations and therefore, the argument of UltraTech is not convincing.

12.23. As regards the submissions of UltraTech that news reports cannot be construed as evidence, it may be noted that news reports were mentioned as a supplemental factor and that too at the stage of issuing show cause notice. Considering that substance of certain news reports has been confirmed by the Acquirer itself, there is no need to even consider the other news reports at this stage.

12.24. As regards non-disclosure of internal assessment report by the Commission as part of inspection of documents and the same being against the principles of natural justice, it may be noted that the same is a confidential internal document which as per the General Regulations cannot be shared with the parties. As per UltraTech's submissions, Century had […] percent share in terms of installed capacity in the market delineated by UltraTech. As the relevant market delineated by the Commission was different from that delineated by Ultratech, the share of Century was estimated to be around […] percent instead of […] percent as estimated by UltraTech. However, this difference in market share estimates does not take anything away from the fact that it was incorrect on the part of UltraTech to present Century as a competitor and the claims of violation of principles of natural justice due to non-provision of internal report do not seem tenable.

13. Based on the aforesaid assessment, the Commission observes that UltraTech had omitted to provide information regarding shareholding/control of KM Family over Century and Kesoram and had made a factually incorrect submission indicating Century as its competitor. The same attracts penalty under Section 44 of the Act. Section 44 of the Act reads as under:

"If any person being a party to the combination –

a. *Makes a statement which is false in any material particular, or knowing it to be false; or*
b. *Omits to state any material particular knowing it to be material,*

Such 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"

14. Accordingly, in terms of Section 44 of the Act, the Commission can levy a minimum penalty of rupees fifty lakhs and a maximum penalty of rupees one crore. Considering the facts of the case, the Commission considers it appropriate to impose a penalty of INR 50,00,000/- (INR Fifty Lakhs only) on the Acquirer.

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

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