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Fair Competition
For Greater Good

COMPETITION COMMISSION OF INDIA

(Combination Registration No. C-2015/05/276)

13.04.2017

Order under Section 43A of the Competition Act, 2002 ("Act")

Background

1. On 19.05.2015, the Competition Commission of India ("**Commission**") received a notice under sub-section (2) of Section 6 of the Competition Act, 2002 ("**Act**") given by Cairnhill CIPEF Limited **(**"**CCL**"**)** and Cairnhill CGPE Limited **(**"**CGL**"**)** (hereinafter, CCL and CGL are collectively referred to as the "**Investors**").

2. The combination related to the acquisition of 11 per cent of equity shares in Mankind Pharma Limited ('**Mankind**' or the **'Target'**) by the Investors *i.e.* 10.77 per cent from Monet Limited and 0.23 per cent from Ms. Dinaz Kaul. For the purpose of the combination, two Share Purchase Agreements ('**SPAs**') *i.e.* (i) Share Purchase Agreement dated 31.03.2015 between CCL, CGL and Monet Limited ('**SPA 1**'); and (ii) Share Purchase Agreement dated 02.04.2015 between CCL, CGL and Ms. Dinaz Kaul ('**SPA 2**') were executed ("**Combination**"). The Investors had submitted that the execution of above SPAs, on standalone basis, would not trigger Section 6 of the Act on account of specific exemption under Schedule I of the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 ("**Combination Regulations**").

3. Subsequently, a Shareholders Agreement was entered into amongst the Investors, Mankind and the promoters of Mankind on 06.05.2015 ("**SHA**"). SHA conferred certain rights on the Investors which were stated to be in the form of minority shareholders' rights and did not result in the Investors acquiring control over Mankind. Accordingly, the combination was stated to be covered under Item 1 of

Schedule I of the Combination Regulations. The Investors further submitted that the aforesaid notice was filed out of abundant caution and that the cause of action, if any, to file the notice under sub-section (2) of Section 6 of the Act arose only on 06.05.2015, on execution of the SHA.

4. The Commission in its meeting dated 25.06.2015, observed that the combination did not fall under any of the Items in Schedule I of the Combination Regulations, more so specifically Item 1. In relation to applicability of Item 1 to the proposed combination, the Commission noted that an acquisition may be considered to be made solely as an investment if the acquirer has no intention to directly or indirectly participate in the formulation and determination of the business decisions of the target. However, in the instant case, the Commission noted that the SHA entitled the Investors to appoint 1 (one) director on the board of directors of Mankind and also conferred certain affirmative rights to the Investors *inter alia* including commencement of a new lines of business, which confers control. Thus, the Commission was of the view that the acquisition of 11 per cent of equity share capital of Mankind is would not be treated as solely as an investment and hence not covered under Item 1 of Schedule I of the Combination Regulations. The Commission further noted that the Investors did not file the notice within 30 days of signing of binding document (here SPA 1) for the purposes of the Act, and instead filed it after entering into SHA, *i.e.* after expiry of 30 days period prescribed under sub-section (2) of Section 6 of the Act. In the said meeting, the Commission considered the combination and approved the same under sub-section (1) of Section 31 of the Act, without prejudice to the proceedings under Section 43A of the Act.

Proceedings under Section 43A

5. The Commission observed that the notifiability of the combination arose from the execution of SPA 1 dated 31.03.2015 and not after execution of SHA dated 19.05.2015. As per the SPAs, the execution of the SHA was a condition precedent for the closing of the combination. Therefore, in terms of Regulation 9(4) of

Combination Regulations, the execution of SPAs and SHA are interconnected steps in respect of the combination. Accordingly, the Commission is of the view that the filing requirement was triggered with the execution of the SPA 1 and not the SHA; therefore, the notice should have been filed within 30 days of the execution of the SPA 1.

6. In view of the foregoing, it *prima facie* appeared that the Investors failed to give the notice of the combination within the time period stipulated under sub-section (2) of Section 6. In its meeting held on 25.06.2015, the Commission, decided to initiate proceedings against the Investors under Section 43A of the Act. Accordingly, a show cause notice dated 14.07.2015 was issued to the Investors under Section 43A of the Act read with Regulation 48 of the Competition Commission of India (General) Regulations, 2009 ("**General Regulations**"), as to why penalty, in terms of Section 43A of the Act, should not be imposed on the Investors for failure to file a notice in respect of the combination under sub-section (2) of Section 6 ("**SCN**"), followed by letters dated 03.05.2016 and 04.08.2016. The Investors filed their responses to SCN on 28.07.2015, 31.05.2016 and 24.08.2016 ("**Response to SCN**") with the Commission.

7. The Commission, in its meeting held on 09.12.2016, considered the Response to SCN and decided to grant oral hearing to the Investors. The authorized representatives of the Investors were heard on 09.02.2017. The Commission noted that, *vide* their written and oral submissions, the Investors, *inter alia*, made the following submissions:

7.1. That the trigger for filing notice under the Act is execution of the SHA and not SPA 1, as the Investors did not acquire any rights, which may tantamount to control, at the time of execution of SPA 1. Further, filing of notice after execution of SPA 1 but before execution of SHA would have been incomplete and pre-mature.

7.2. That one of the conditions precedent to closing contained in Clause 3.2. of SPA 1 reads:

"*Prior to the First Long Stop Date: (a) the Shareholder's Agreement shall have been executed between the Company, the promoters of the Company and the Investors*; …."

Further, Clause 3.8 of SPA 1 reads:

"*Each Party undertakes to use its best endeavours to fulfil the Conditions Precedent set out in Clause 3.2.above, on or prior to the First Long Stop Date. In the event of the failure of the parties to fulfil the Conditions Precedent under Clause 3.2 prior to the First Long Stop Date (unless waived in accordance with Clause 3.7 (Waiver of Conditions Precedent) above), this Agreement (other than Clause 9.3.6 of this Agreement) shall terminate without any further action on the part of any of the Parties and no Party shall have any claim against any other Party under this Agreement (except in respect of: (a) any rights and liabilities which have accrued in relation to any antecedent breach; and (b) Clause 9.3.6 of this Agreement).*"

The term First Long Stop Closing Date ("**long stop date**") has been defined in the SPA 1 as "*... the date falling 10 Business Days from the Agreement Date*". Consequently, the First Longstop date for executing SHA as per SPA 1 was 20.04.2015. With a combined reading of the above the clauses, it is implied that if the parties fail to execute the SHA (unless the condition is waived in writing), then the respective SPAs shall automatically terminate. Therefore, there was no valid SPA based on which the notice could have been filed with the Commission. Accordingly, pursuant to entering into SHA on 06.05.2015, the Parties extended the long stop date to 10.05.2015 *vide* their letter(s) dated 07.05.2015.

7.3. That in terms of Clause 3.4 (c) of SPA 1, obtaining requisite Government Approvals including approval from Competition Commission of India was among the conditions precedent to closing. SPA 2 also contained similar provisions.

7.4. That the violation, if any, is purely technical, as the Investors were under *bonafide* belief (based on professional advice) that the requirement of making a merger filing was not triggered at the time of execution of the SPAs. That the Competition Appellate Tribunal ("**COMPAT**"), *vide* its order dated 26.08.2015 in the appeal of *Thomas Cook (India) Limited*, while setting aside the Commission's order for imposition of penalty, held that the imposition of penalty is not justified if the violation of sub-section (2) of Section 6 of the Act is purely technical. The Hon'ble COMPAT took into account the fact that there was no suppression on the part of the parties for the purpose of obtaining any advantage under the Act.

7.5. That without prejudice to the aforesaid submissions, there is inadvertent delay of only 19 days and the Commission may take a lenient view taking into account the following mitigating factors:

7.5.1. That they had no *malafide* intention to evade a merger filing and believed that minority investment in Mankind on standalone basis through the execution of SPA would not trigger Section 6 of the Act.

7.5.2. That they have made voluntary filing upon execution of SHA, which is entered into after various deliberations and negotiations.

7.5.3. That the transaction was not consummated at the time of filing of notice. The same is consummated only after receiving the approval from the Commission on 25.06.2015.

7.6. That in similar circumstances, the Hon'ble Commission in the case of *Dewan Housing Finance Corporation Limited vide* its order dated 03.01.2013 has held that *"…delay on account of incorrect legal advice may be regarded as a mitigating factor in levying penalty…"*. However, the Hon'ble Commission, considering the inordinate delay of 388 days on the part of the parties to the

transaction in making the merger filing, imposed penalty of only rupees five lacs.

7.7. That *vide* its order dated 30.12.2015, the Hon'ble Commission in the case of *Johnson & Johnson Innovation, Inc.*, after considering that the merger filing was made voluntarily before giving effect to the transaction and delay of 43 days in making the merger filing, imposed a penalty of rupees five lacs.

7.8. That the Hon'ble Commission did not impose any penalty in *Uttam Galva Steels Limited/ Shree Uttam Steel and Power Limited* considering the voluntary filing and delay of only six days.

7.9. That in the matter of *Clariant Chemicals/Lanxness,' Diasys/Piramal*, and *Hindustan Colas/Shell*, where the transaction was consummated or partly consummated, the Hon'ble Commission had imposed penalty of rupees one lacs, two lacs and five lacs respectively.

7.10. That the Hon'ble Commission should take into account the unequivocal intention of the Investors to fully comply with the provisions of the Act. The Investors are a part of a global private equity business (i.e. Capital International Private Equity Funds) of the Capital Group which believes in strict compliance with all applicable laws. Capital Group is an active investor in the Indian Market and a lenient view by the Hon'ble Commission in circumstances such as these would go a long way in showing the Hon'ble Commissions' willingness to give due importance to the substance and not the form while implementing progressive economic legislations, such as the Act.

8. With respect to the written and oral submissions of the Investors as mentioned above, the observations of the Commission are as under:

8.1. The Commission noted that, the trigger for notification in respect of the combination, under sub-section (2) of Section 6 of the Act, arose from the

execution of SPA 1 and that the execution of SHA was a condition precedent for the closing of the combination in terms of the provisions of SPA 1. The sub-regulation (4) Regulation 9 reads as under:

"Where the ultimate intended effect of a business 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"

Accordingly, SPA 1, SPA 2 and SHA are inter-connected and inter-dependent in terms of sub-regulation (4) of Regulation 9 of the Combination Regulations and the notice in the instant case ought to have been filed within 30 days of the execution of the SPA 1.

8.2. The Investors have submitted that clause 3.2 of SPA 1 required execution of SHA on or before the long stop date *i.e* 20.04.2015 as one of the condition precedent and clause 3.8 of SPA 1 further provided that SPA 1 shall stand terminated in the event of non-fulfilment of conditions precedent as contained in clause 3.2. Accordingly, on a combined reading of clause 3.2 and clause 3.8, in the event of non-execution of SHA on or before the long stop date, the SPA 1 stood terminated. In view of this, the Investors contended that there was no valid SPA 1 on 06.05.2015, based on which notice could have been filed under sub-section (2) of Section 6 of the Act. In this regard, the Commission observed that long stop date was extended by the Investors *vide* letters dated 07.05.2015, whereas the SHA had been executed on 06.05.2015. The Commission noted that in the absence of any extension of long stop date beyond 20.04.2015, there was no valid SPA 1 on 06.05.2015. The Commission further noted that in the absence of a valid share purchase agreement *i.e* SPA 1 the SHA could not have been given effect to on 06.05.2015, despite that SHA was executed by the Investors on 06.05.2015. Therefore, the Commission did not find any merit in the contention of the Investors. Further, the Commission held that if this argument of the Investors is accepted, it would mean that they may keep amending the transaction documents and thereby keep postponing the

notification timelines. This would render the statutory timeline of filing a notice within 30 days of the execution of the agreement for acquisition, meaningless.

8.3. With regard to the contention of acting bonafide as per the professional advice, the Commission noted that in the written professional advice it is stated that *"....The existing shareholder agreement between the Seller* [Monet Limited] *and Mankind envisage certain 'rights' to shareholder. The buyer* [Investors] *is likely to enjoy similar rights pursuant to the above transaction."*

It is further stated therein that *"In the Instant case, the rights stated in the term sheet such as those given below are similar to those adjudicated by the Commission* [as control in case of Century Tokyo Leasing Corporation/Tata Capital Financial Services Limited] *....1. Board Representation- one investor nominated Director to the Board (also on the Audit and compensation committees) 2. Reserved matters (Veto) – share issuances, mergers, acquisition, sale of business or assets, winding up, auditor change, dividends, buybacks, related party transactions, change in articles, entering into new business)".*

As the Seller (Monet Limited), holding 10.77 percent stake in Mankind/ Target, had the aforesaid affirmative rights, which tantamount to control as per the decisional practice of the Commission, it is beyond doubt that the Investors were going to get aforesaid affirmative rights that tantamount to control. The Commission observed that the professional advice referred by the Investors did point out the continuation of affirmative rights held by the Seller. Thus, the Commission did not find any merit in this argument taken by the Investors.

9. In this regard, it is noted that sub-section (2) of Section 6 of the Act reads as under:

"…… any person or enterprise, who or which proposes to enter into a combination, shall give notice to the Commission……. disclosing the details of the proposed combination, within thirty days of……. execution of any agreement or other document for acquisition referred to in clause (a) of section 5 or acquiring of control referred to in clause (b) of that section…" (emphasis added)

10. Thus, in terms of sub-section (2) of Section 6 of the Act, an enterprise, which proposes to enter into a combination, is required to give notice to the Commission, disclosing the details of the combination, within thirty days of execution of any binding agreement or other document. In the instant case, it is observed that the Investors failed to give notice of the combination to the Commission within thirty days of execution of the SPA 1 dated 31.03.2015 *i.e.* by 30.04.2015.

11. It is further noted that the Hon'ble Supreme Court has held in *The Chairman, SEBI v Shriram Mutual Fund and Anr.,* that "*…the penalty is attracted as soon as contravention of the statutory obligations as contemplated by the Act is established and, therefore, the intention of the parties committing such violation becomes immaterial. In other words, the breach of a civil obligation which attracts penalty under the provisions of an Act would immediately attract the levy of penalty irrespective of the fact whether the contravention was made by the defaulter with any guilty intention or not…".*

12. In view of the foregoing, it emerges that the Investors have failed to give notice to the Commission in accordance with the provision of sub-section (2) of Section 6, which attracts penalty under Section 43A of the Act. Section 43A of the Act reads as under:

> "*If any person or enterprise who fails to give notice to the Commission under sub-section (2) of section 6, the Commission shall impose on such person or enterprise a penalty which may extend to one per cent of the total turnover or the assets, whichever is higher, of such a combination*"

13. Accordingly, in terms of Section 43A of the Act, a maximum penalty of one per cent of the combined value of worldwide assets of the parties can be imposed. However, considering the totality of the facts of the case and the submissions made by the Investors, the Commission deemed it appropriate to impose a penalty of INR 5,00,000/- (INR five lakh only) on the Investors.

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

15. The Secretary is directed to communicate to the Investors accordingly.