



COMPETITION COMMISSION OF INDIA
(Combination Registration No. C-2015/07/293)



26th April, 2017

Notice filed by EMC Ltd. under Section 6 (2) of the Competition Act, 2002

CORAM:

Mr. Devender Kumar Sikri
Chairperson

Mr. Sudhir Mital
Member

Mr. Augustine Peter
Member

Mr. U. C. Nahta
Member

Mr. G. P. Mittal
Member

Legal representative: Khaitan & Co. LLP

Order u/s 43A of the Competition Act, 2002

Background

1. On 14th July, 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 EMC Limited (“**EMC**”), pursuant to an Investment Agreement (‘**IA**’) dated 30th June, 2015 (“**IA**”), entered into and between EMC, McNally Bharat Engineering Company Limited (“**MBECL**”) and the Promoter Group¹ of MBECL.

¹ Promoter Group of MBECL includes following entities: MeLord Russel India Limited (‘**MRIL**’), Williamson Magor & Co. Limited (‘**WMCL**’), Babcock Borsing Limited (‘**BBL**’), Williamson Financial Services Limited (‘**WFSL**’), Kilburn Engineering Limited (‘**KEL**’), Bishnath Investments Limited (‘**BIL**’) and Mr. Amritanshu Khaitan.



2. The combination related to acquisition by EMC of 19.77 per cent shareholding of MBECL (**'Second Acquisition'**). It was stated in the notice that the said IA triggers an open offer under the provisions of the Securities Exchange Board of India (Substantial Acquisition of Shares and Takeover) Regulations, 2011 (**"Takeover Code"**), under which EMC along with WMCL, were jointly required to make an open offer, to the public shareholders of MBECL, to acquire up to 26 per cent of the shares in MBECL. Post subscription of shares by EMC and acquisition of shares in the open offer, MBECL was to be under the joint control of EMC and the Promoter Group.
3. The Commission further observed from the notice that the MKN Investment Private Limited (**'MKN'**), a promoter group company of EMC, had already subscribed to 12.32 per cent share capital of MBECL in the month of March 2015 (**'First Acquisition'**) (**hereinafter, 'EMC and MKN are together referred to as 'Acquirers'**). It *prima facie* appeared to be the trigger for the acquisition of control of MBECL by EMC an accordingly notifiable under Section 6(2) of the Act.
4. On 1st September, 2015, the Commission considered and assessed the combination and approved the same under Section 31 (1) of the Act without prejudice to any proceedings under Section 43A of the Act. Further, the Commission also decided to initiate proceedings under Section 43A of the Act read with Regulation 48 of the Competition Commission of India (General) Regulations, 2009 (**"General Regulations"**) for failing to file notice in respect of First Acquisition, in accordance with Section 6(2) of the Act.
5. Accordingly, a Show Cause Notice (**'SCN'**) dated 16th October, 2015 was issued to the Acquirers requiring 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 them.

Proceedings under Section 43A of the Act

6. The Commission *prima facie* observed that the First Acquisition was first step towards acquisition of control of MBECL by EMC for the following reasons:
 - 6.1 Requirement to make an open offer under the SEBI (Substantial Acquisitions and Takeover) Regulations 2011, for acquisition of control of MBECL was on account of cumulative holding of stake by Acquirers in MBECL pursuant to both acquisitions.



- 6.2 First Acquisition and the Second Acquisition took place in a short span of time i.e. within four months.
- 6.3 Two out of three directors of MKN served as the Managing Director and Joint Managing Director of EMC. Therefore, it appeared that the board of both companies were aware that the EMC group intends to acquire control over MBECL.
- 6.4 First Acquisition was made by a group company of EMC in its competitor and therefore, it was strategic in nature. Both EMC and MBECL are competitors engaged in Engineering, Procurement and Construction ('EPC') and supply of T & D equipment including substations.
- 6.5 Further, there were news reports² suggesting MKN's equity interest in MBECL. Specifically, it was reported "*McNally Bharat Engineering Co. Ltd, a construction and engineering firm of the Williamson Magor Group, on Monday took the first step toward getting a strategic investor to turn itself around*".
7. The response to SCN was filed on 3rd November, 2015 ("**Response to SCN**").
8. Vide letter dated 29th March, 2016 ('**Letter I**'), Acquirers were required to furnish information, *inter-alia*, relating to group structure chart for each of Acquirers and names of the common promoters or promoter group companies of Acquirers. The response to the same was received on 18th April, 2016. ('**Response I**')
9. The Commission also sought additional information, vide its letter dated 27th July, 2016 ('**Letter II**'), relating, *inter-alia*, to: (a) Communication between director(s) / officer(s) of EMC and MKN with those of MBECL; (b) Communication to the stock exchanges or SEBI, if any, made by EMC, MKN and MBECL for the year 2014, relating to Acquirer's investment in MBECL; and (c) Copy of the presentation(s), report(s), or other document(s), if any, relating to Acquirer's investment in MBECL. The response to the same was received on 16th August, 2016. ('**Response II**')

² <http://www.livemint.com/Money/dlaN4PgZhlNjISiyRJGGPL/McNally-Bharat-to-raise-Rs125-crore-through-share-sale.html>
<http://www.dnaindia.com/money/report-khaitan-sells-majority-stake-in-mcnally-to-emc-2100924> and
<http://www.thehindubusinessline.com/companies/williamson-magor-ropes-in-emc-as-strategic-investor-in-mcnally-bharat/article7374612.ece>



10. Further, the Commission noted certain information from the submissions given in Response I, Response II and information in public domain *inter-alia*, relating to strategic nature of the First Acquisition and commencement of investment process by EMC in the year 2014 i.e. before the First Acquisition. Accordingly, a continuing SCN seeking response from Acquirers was issued on 16th November, 2016. On request of the Parties, the Commission, in its meeting held on 27th February, 2017, decided to grant additional time to submit response to the continuing SCN till 31st March, 2017 (**‘Response to SCN 1’**). The Commission also decided to grant oral hearing to the Parties on 12th April, 2017, on their request. The Response to SCN 1 was received on 31st March, 2017, along with a request to adjourn the oral hearing for a week’s time. The Commission considered the request and fixed the hearing on 26th April, 2017. The authorised representatives of the EMC and MKN presented their case on 26th April, 2017.
11. The submissions given by the Acquirers in the Response to SCN, Response I, Response II, Response to SCN 1 (**‘Responses’**) and during oral hearing, are summarized as under:
- 11.1. That First Acquisition was an investment made by MKN which is a non-deposit accepting Non-banking financial company to a cash starved company.
- 11.2. That the First Acquisition did not amount to a combination as this was an acquisition in the ordinary course of business of MKN and therefore, was exempt from notification to the Commission under Item I of Schedule I of the Competition Commission of India (Procedure in Regard to the Transaction of Business Relating to Combinations) Regulations, 2011 (**‘Combination Regulations’**).
- 11.3. That the First Acquisition and Second Acquisition are not inter-related or inter-connected transactions under sub regulation (4) of Regulation 9 of Combination Regulations, 2011, in that the first acquisition was an independent transaction undertaken by a promoter group company of EMC Ltd.
- 11.4. That at the time of First Acquisition (made by way of preferential allotment of shares by MBECL to MKN), no mention of any share acquisition by EMC was made. Further, no rights were acquired by MKN that could be said to be strategic.



- 11.5. That mere occurrence of the First and Second Acquisition contemporaneously cannot alone link the two independent transactions. First Acquisition did not refer to the completion of the Second Acquisition as a condition precedent. It was already completed before any discussion had commenced between EMC and MBECL in relation to the Second Acquisition.
- 11.6. That EMC and MKN are group companies; MKN holds 29.78% of the equity share capital of EMC and two of the total three directors of MKN serve as the Managing Director and Joint Managing Director of EMC. Further, MKN is not an independent company from EMC. Prior to First Acquisition, MKN held 10.81 per cent in EMC.
- 11.7. That with regards to increase in shareholding of MKN in EMC, EMC in its Extra-Ordinary General Meeting on 25th March, 2015, passed a resolution to convert the loans advanced to EMC by MKN into equity shares, in terms of Section 62(3) of the Companies Act, 2013 and other applicable provisions. Accordingly, on 30th March, 2015, MKN, by way of a letter of commitment to EMC, proposed an increase in the shareholding of MKN in EMC. A board meeting of the directors of EMC was held on 27th April, 2015, wherein resolution was passed to increase the shareholding of MKN in EMC.
- 11.8. That there is nothing on record to show that the board of directors of either MKN or EMC had any knowledge of control of MBECL to be acquired through the Second acquisition.
- 11.9. That common directors or cross-shareholding between Acquirers could not be taken as proof that MKN at the time of the First Acquisition had knowledge of EMC's subsequent acquisition of equity shares in MBECL.
- 11.10. That MBECL's market share in the market for substations is miniscule.
- 11.11. That there were no discussions between the board of directors/officers of MKN and MBECL with respect to First Acquisition prior to 31st January, 2015. However, in July 2014, MKN engaged Leverage Capital Private Limited, ('Leverage') as its advisor, for a potential transaction in MBECL. Leverage, in turn, engaged Grant Thornton India LLP ("Grant Thornton") to conduct a due diligence of MBECL for the purposes of investment by MKN into MBECL. Accordingly, a report dated 3rd September, 2014 was prepared by Grant Thornton, and submitted to Leverage. Based on the analysis presented by Grant Thornton in the due diligence report, MKN decided to invest in MBECL.



11.12. That MKN was considering investment in MBECL in the latter half of the year 2014; however, the documents relating to transaction between MKN and MBECL were only exchanged during the period (January 2015 – March 2015). That EMC had in good faith and without any intention to conceal anything from the Commission, informed the Commission about the existence of the First acquisition. That the disclosure of the First Acquisition in the notice reveals *bonafides* of the Acquirer.

11.13. That mere temporal proximity of the investments by Acquirers into MBECL cannot in any manner establish that these two transactions were linked. This view has also been upheld by the Hon'ble Competition Appellate Tribunal in the appeal filed by Thomas Cook (India) Limited & Ors vs CCI.

11.14. That evidentiary value of newspaper articles is dubious according to the Supreme Court and COMPAT.

12. The Commission considered and assessed the written and oral submissions of the EMC and MKN. The submissions of the Acquirer raise following issues:

- Whether EMC and MKN belong to the same group;
- Whether the two transactions are inter-connected and strategic in nature.

The observations of the Commission on the above-mentioned submissions are as under:

(i) Whether EMC and MKN belong to the same group

12.1. It is observed that both at the time of First Acquisition and Second Acquisition, the Managing Director and the Joint Managing Director of EMC (*viz.*, Mr. Manoj Toshniwal and Mr. Ramesh Bardia, respectively) are two of the three directors on the Board of Directors of MKN and MKN is a promoter group company of EMC.

12.2. Further, in the letter of offer by EMC to the public shareholders of McNally Sayaji Engineering Limited ('MSEL') and MBECL, MKN was mentioned as person acting in concert ('PAC 1') and that MKN has been stated to be a part of EMC group. Also the



Commission observed that there were common promoters/promoter group companies of EMC and MKN. In a News Release (**'News Release'**) signed by Mr. Manoj Toshniwal and Mr. Aditya Khaitan, Managing Director and Chairman of EMC and MBECL respectively, issued for the Second Acquisition on 30th June, 2015, MKN was referred as a group company of EMC. In Responses, it has been stated that MKN is not an independent company from EMC and MKN and EMC are group companies. In the Annual Report for F.Y. 2014-15 of MBECL, it has been reported that *"MKN investments, a group company of EMC, had made an equity investment of INR 50 Crore in March 2015 in the MBECL. In view of the above, the Commission is of the view that EMC and MKN belong to the same group.*

(ii) Whether the two transactions are inter-connected and strategic in nature

12.3. The Commission, in Comb. Regn. No. C-2014/08/202, had observed that where an acquirer and the target are engaged in the same, substitutable or competing businesses or where their businesses are vertically related, such acquisition of shares / voting rights of less than 25% *"need not necessarily be termed as an acquisition made solely as an investment or in the ordinary course of business"*.

12.4. EMC and MBECL are both engaged in EPC and supply of T&D equipment and MBECL and EMC are competitors in the market for sub-stations and the First Acquisition was made by a group company of EMC in its competitor.

12.5. As per international best practices and approach followed by mature jurisdictions⁴, *'solely as an investment'* exemption does not apply where:

(a) The target holds more than 10% of a competitor of the acquirer; or

(b) The acquirer holds more than 10% of a competitor of the target.

12.6. The acquirer in the First Acquisition (i.e. MKN) held more than 10% in a competitor (i.e. **EMC**) of the target (i.e. **MBECL**). Given that MKN and EMC are entities belonging to same group and EMC is a competitor of MBECL in the substations markets, the First

⁴ E.g. *Hart Scott Rodino Rules in the USA.*



Acquisition by MKN of 12.32% of the equity shares of MBECL would not be considered as “solely as an investment or in the ordinary course of business”.

12.7. First Acquisition and Second Acquisition took place within a very short span of three months (First acquisition took place in March 2015 followed by the Second acquisition in June 2015). In this regard, the Commission noted that even mature jurisdictions including European Commission also take cognizance of time period elapsed between the two transactions taking place between same persons or undertakings or entities belonging to same group, to determine the inter-related nature of transactions.

12.8. The Annual Report of MKN for year F.Y. 2014-15 shows that apart from EMC, MKN acquired and held non-current investments only in MBECL. Further, in the F.Y. 2013-14, it held non-current investments only in EMC.

12.9. It is stated in the “*Strategic investment*” section of Director’s Report of Annual Report for F.Y. 2014-15 of MBECL that “*MKN investments, a group company of EMC, had made an equity investment of INR 50 Crore in March 2015 in the MBECL and it holds 12.5% stake in it*”.

12.10. As per submissions, MKN engaged Leverage, as an advisor for First acquisition in MBECL. Further, Leverage in turn engaged Grant Thornton to conduct a due diligence of MBECL reportedly for First acquisition and based on the analysis presented by Grant Thornton in the due diligence report, MKN decided to invest in MBECL. However, the Commission observes that there is nothing on record to show that MKN engaged Leverage to carry out the due diligence. On the contrary, the Commission took the cognizance of the News Release for the Second Acquisition which stated that, “*Motilal Oswal Investment Advisers and Leverage Capital acted as the strategic and financial adviser of the transaction*”.

12.11. The submission that there were no discussions between the board of directors/officers of MKN / EMC with those of MBECL, prior to 31st January, 2015, is unconvincing as it is not plausible without the knowledge of the directors/officers/management of MBECL that Grant Thornton could perform the fieldwork in the office of MBECL on behalf of EMC/MKN.



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12.12. It has also been observed that EMC and MBECL also filed a combination⁵ with the Commission in respect of amalgamation of EMC Limited, MBECL, MSEL and Kilburn Engineering Limited through a court approved scheme.

12.13. As per news report dated 29th July 2014 published in the Live Mint, “*the Khaitan family of Williamson Magor Group is ceding control of its engineering business but for now will retain a minority stake in McNally Bharat Engineering Co. Ltd.*” The news report also stated that “*an investor has been identified and the buyer is a leader in developing electricity transmission infrastructure.*”

12.14. As per News article dated 7th August, 2014, published in the Economic Times, “*A change is in the air and the family has started off the exercise of cutting down its exposure in engineering business by roping in a 'strategic partner'. The group is in talks with EMC (formerly known as Electrical Manufacturing Company) for a 'strategic alliance' to scale up the company's business.*”

The news articles mentioned in paras 12.13 and 12.14 when read with other facts and evidences, as enumerated above, further strengthens the fact that MBECL was looking for a strategic partner and first step in this direction was First Acquisition.

13. Considering the above facts and evidences in entirety, the Commission is of the considered view that the intent and purpose of the First Acquisition and Second Acquisition, were to be a part of MBECL’s management and both the acquisitions were made with a common objective to secure a long term and strategic partnership with the MBECL. Accordingly, the First acquisition was the first step in the series of transactions and notice should have been filed with the Commission at that time. MKN had failed to file the notice under the provisions of subsection (2) of Section 6 of the Act.

14. Failure to file notice under the provisions of subsection (2) of Section 6 of the Act attracts the provisions of Section 43A of the Act. Section 43A of the Act reads as under:

⁵ Combination Case No: C-2016/04/395.



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“If any person or enterprise who fails to give notice to the Commission under sub section(2) of section 6, the Commission shall impose on such person or enterprise a penalty which may extend to one percent of the total turnover or the assets, whichever is higher, of such a combination.”

15. Accordingly, in terms of Section 43A of the Act, a maximum penalty of one per cent of the combined value of worldwide total turnover or assets, whichever is higher, of the parties can be imposed. However, considering the totality of the facts of the case and the submissions made by the EMC and MKN, the Commission deemed it appropriate to impose a penalty of INR 5,00,000/- (INR five lakh only) on them. They 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 EMC and MKN accordingly.