सत्यमेव जयते

Fair Competition
For Greater Good

COMPETITION COMMISSION OF INDIA

(Combination Registration No.C-2015/09/313)

31.08.2016

Order under Section 43A of the Competition Act, 2002 ("Act") in relation to combination registration no. C-2015/09/313

Introduction

1. The Competition Commission of India ("**Commission**"), in its meeting held on 30.03.2015, on *suo-moto* basis noted that Diasys Diagnostics Systems GmbH, Germany ("**Diasys Germany**"), through its subsidiary DiaSys Diagnostics India Private Limited ("**DiaSys India**"), has acquired lab diagnostics and point of care business ("**LDPOC Business**") of Piramal Enterprises Limited ("**Piramal**") (hereinafter, the acquisition of LDPOC Business of Piramal by DiaSys Germany is referred to as the "**Transaction**"). As the Transaction was not notified to the Commission in terms of sub-section (2) of Section 6 of the Act, a communication dated 08.04.2015 was issued to DiaSys Germany and DiaSys India under sub-section (1) of Section 20 of the Act, seeking information relating to the aforesaid acquisition. The response of DiaSys India was received on 14.05.2015.

2. The Commission, in its meeting held on 14.07.2015, while considering the response filed by DiaSys India, observed that the parties to the combination meet the notification thresholds and therefore, the acquisition of LDPOC Business of Piramal by DiaSys Germany, it appeared, was notifiable under the relevant provisions of the Act. Thus, in accordance with sub-section (1) of Section 20 of the Act read with sub-regulation (2) of Regulation 8 of the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 ("**Combination Regulations**"), the Commission directed DiaSys Germany to file notice in Form I within 30 days of receipt of communication in this regard. The directions of the Commission were communicated to Diasys Germany and its wholly owned subsidiary, DiaSys India vide letter dated 10.08.2015.

3. Accordingly, DiaSys India filed a notice with the Commission on 28.09.2015, after seeking extension of time.

4. The Commission, in its meeting held on 03.12.2015, considered the combination and approved the same under sub-section (1) of Section 31 of the Act without prejudice to proceedings under Section 43A of the Act. The Commission, in the said meeting, further noted that Diasys India is a special purpose vehicle created by Diasys Germany for the proposed combination and as such, decided that for the purposes of proceedings under the Act, Diasys Germany together with Diasys India will be deemed to be the acquirers (hereinafter, Diasys Germany and Diasys India are together referred to as the "**Acquirers**").

Proceedings under Section 43A of the Act

5. 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 agreement or other document for acquisition. For the purpose of the Transaction, DiaSys India entered into a Sale & Purchase Agreement ("**SPA**") with Piramal on 15.09.2014. Thus, the notice in respect of the Transaction should have been filed by the Acquirers within thirty days of the execution of SPA i.e. by 15.10.2014. However, the notice was filed by the DiaSys India only on 28.09.2015, after the Commission had issued a direction to DiaSys India to file the notice. Further, it appeared from the submissions made by DiaSys India that the Transaction has already been consummated.

6. In view of the above, the Commission was of the *prima facie* opinion that the Acquirer not only failed to give the notice of the combination within the time stipulated under sub-section (2) of Section 6 but also effected the same before the expiry of 210 days from the date of filing of the notice with the Commission or the Commission has passed any order under Section 31 of the Act, whichever is earlier which is in contravention of sub-section (2) read with sub-section (2A) of Section 6 of the Act. The Commission observed that failure to give notice in accordance with sub-section (2) of Section 6 read with sub-section (2A) of Section 6 attracts penalty under Section 43A of the Act.

7. Accordingly, the Commission, in its meeting held on 03.12.2015, decided to initiate proceedings under Section 43A of the Act and a show cause notice was issued to the Acquirers on 01.01.2016 under Section 43A of the Act read with Regulation 48 of the Competition Commission of India (General) Regulations, 2009 ("**General Regulations**") to

explain, in writing, within 15 days of the receipt of such communication as to why penalty, in terms of Section 43A of the Act, should not be imposed on the Acquirers for failure to file a notice in respect of the combination under sub-section (2) of Section 6 of the Act ("**SCN**"), the response to which was received on 15.01.2016 ("**Response to SCN**").

8. The Commission, in its meeting held on 24.05.2016, considered the Response to SCN and decided to grant personal hearing to the Acquirers, as requested. The authorized representatives of the Acquirers were heard on 29.06.2016. The Commission noted that the Acquirers, *inter alia*, made following written submissions in their Response to SCN:

8.1 That DiaSys India has not been incorporated as a special purpose vehicle of DiaSys Germany and it is DiaSys India, and not DiaSys Germany, which is the 'acquirer' of LDPOC Business.

8.2 That prior to the consummation of the Transaction, DiaSys India believed that computation of the threshold for filing a notice required taking into account only the relevant business of Piramal. Further, based on discussions with Piramal in this regard, DiaSys India was of the understanding that it is not required to file the notice with the Commission as the transaction related to acquisition of a loss making small value business unit on slump sale basis.

8.3 That DiaSys India was under the bona fide belief that a notification was not necessary as the transaction was merely the acquisition of a loss making insignificant business unit from Piramal for a relatively small consideration and, therefore, the threshold criteria laid down under the Act and Rules were not triggered. Further, the obligation to file Form I has arisen only due to the large revenues and assets of the Piramal group.

8.4 That DiaSys India and Piramal did not have any horizontal overlap prior to or after the combination. Further, there was hardly any likelihood of any vertical overlap, since Piramal was exiting loss making LDPOC Business. Therefore, there was absolutely no reason for DiaSys India to conceal the transaction or its details from any scrutiny by the Commission. It has also been submitted that the Commission has approved the combination as the same has not caused or is likely to cause any appreciable adverse effect on competition in India. Thus, no harm or prejudice has been caused due to filing

of the notice at a belated stage. The omission to file the notice is therefore only a technical or venial breach that may kindly be pardoned under the circumstances.

8.5 That DiaSys India has demonstrated its good conduct right from the receipt of the first communication from the Commission in May 2015, and has responded to all the communications received from the Commission in a timely manner. It has never been the intent of DiaSys India to act deliberately in defiance of the law or in conscious disregard of their obligations under the Act or to avoid or mislead the Commission in any manner. Therefore, a distinction should be made between wilful disobedience of the law and an inadvertent omission due to misconception.

8.6 That from the date of consummation of the Transaction, i.e., 15.09.2014, till date, DiaSys India has not been able to make any profits and is incurring losses. Further, despite reeling under losses, DiaSys India has continued to retain all the employees transferred by Piramal to DiaSys India along with the LDPOC Business and has not retrenched a single employee from the date of consummation of the Transaction till date.

8.7 That in view of the above, no penalty should be imposed under the provisions of Section 43 A of the Act.

9. During the oral hearing, the authorised representatives of the Acquirers further submitted that the factory of DiaSys India located in Pawane, Navi Mumbai, which was acquired from Piramal for manufacturing of advanced diagnostic equipments, was completely gutted by fire on 06.05.2016, leading to complete cessation of its production activities in India. Further, DiaSys India was unable to salvage anything from the fire and is staring at significant losses as a result of lost production, inventory, disruption in business, etc.

10. On 04.07.2016, DiaSys India submitted an affidavit in support of its submission as stated in paras 8.6 and 9 above.

11. The Commission has considered the available information and submission of the Acquirers. 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)

12. Further, sub-section (2A) of Section 6 of the Act reads as under:

"No combination shall come into effect until two hundred and ten days have passed from the day on which the notice has been given to the Commission under sub-section(2) or the Commission has passed orders under section 31, whichever is earlier"

13. 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 proposed combination, within thirty days of execution of any agreement or other document for acquisition. Further, as per sub-section (2A) of Section 6 of the Act, a combination shall not come into effect until 210 days have passed from the date of filing of the notice with the Commission or the Commission has passed any order under Section 31 of the Act, whichever is earlier.

14. In relation to the need for notifying, Section 5 of the Act reads as under:

"The acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises shall be a combination of such enterprises and persons or enterprises, if—
(a) any acquisition where—
(i) the parties to the acquisition, being the acquirer and the enterprise, whose control, shares, voting rights or assets have been acquired or are being acquired jointly have……." (emphasis added)

In the instant case, DiaSys Germany and DiaSys India together are the acquirers and Piramal is the enterprise whose assets have been acquired and therefore, the value of assets and turnover of Piramal along with the Acquirers has to be considered for the purpose of

determining notifiability under the Act. On the basis of information given, it is noted that the Acquirers along with Piramal meet the thresholds prescribed under clause (a) of Section 5 of the Act and therefore the acquisition of LDPOC Business by the Acquirers is a notifiable combination to the Commission. Further, the value of assets and turnover of Piramal (i.e. the target enterprise), for the financial year preceding the date of execution of SPA, exceeds the value of asset and turnover set out in the Notification No. SO 482 (E) dated 4 March 2011, as amended by the corrigendum no. SO 1218 (E) dated 27 May 2011 ("**De Minimis Exemption**"), which exempts acquisitions of a target enterprise with sales or assets in India below INR 750 crores and INR 250 crores respectively.

15. With respect to the other submissions of the Acquirers, as mentioned above, the Commission observed as under:

15.1 In relation to the argument of the Acquirers that DiaSys India did not have clarity on whether the computation of the filing threshold it is noted that "Ignorance of law is not an excuse" is a well-established legal principle. A mistaken belief about a law is not a valid defence to a violation of law. It is an irrebuttable presumption that people who are about to engage in an activity will comply with applicable law. Thus, the Acquirer cannot plead that they did not have the clarity about the application of law i.e. Competition Act, 2002.

15.2 Further, the Commission offers pre-filing consultation to anyone that requires clarification on the filing requirements. If the Acquirers did not have the clarity on whether the computation of the filing threshold will take into consideration the entire assets and turnover or other unrelated business of Piramal, they could have approached the Commission for any clarifications on the filing requirements in respect of the present combination. However, the Acquirers did not avail the facility of a pre-filing consultation, on this aspect.

15.3 In relation to the argument of the Acquirers that DiaSys India and Piramal did not have any horizontal overlap prior to or after the combination, it is noted that absence of any horizontal or vertical overlap is not a criteria for determination of the notification requirements under sub-section (2) of Section 6 of the Act. Further, absence of any appreciable adverse effect on competition is also not an excuse for not filing the notice

with the Commission. If the parties to the combination meet the jurisdictional thresholds prescribed under Section 5 of the Act and the combination is not exempt otherwise, they should comply with the requirements of Section 6 of the Act.

15.4 As regards the argument of the Acquirer that omission to file the notice was a technical or venial breach, it is noted that in the instant case the Acquirers have not merely delayed filing of the notice with the Commission but also failed to file the notice with the Commission. In the event that the Commission would not have taken *suo moto* cognisance of the combination, it would have escaped the scrutiny of the Commission as to whether the combination has resulted in appreciable adverse effect on competition in India. Accordingly, the Commission is of the opinion that failure on the part of the Acquirer was not merely technical but rather, a substantive violation of the provisions of the Act.

15.5 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…".*

15.6 In relation to the submission of the Acquirers that it is DiaSys India, and not DiaSys Germany, which is the 'acquirer' of LDPOC Business, it is noted that para 6.2.2 of the notice states that "*DiaSys Germany decided to acquire the loss making LDPOC Business through its newly created subsidiary in India, DiaSys India*." Further, para 6.3(c) of the notice states that "*Piramal made an offer to DiaSys Germany to takeover and continue the LDPOC business in its name through setting up a subsidiary in India*." Further, as per clause (a) of Section 2 of the Act, the term "*acquisition*" involves both "*direct*" and "*indirect*" acquisitions. In the instant case, DiaSys Germany has indirectly acquired the LDPOC Business from Piramal. Thus, in view of the foregoing, it is clear that the LDPOC Business in-essence has been acquired by DiaSys Germany and DiaSys India has been utilized as a special purpose vehicle for effectuating the same.

16. In view of the foregoing, the Commission is of the opinion that the contentions of the Acquirers are not maintainable as the Acquirers along with Piramal meet the thresholds prescribed under clause (a) of Section 5 of the Act and therefore the acquisition of LDPOC Business by the Acquirers is notifiable to the Commission in accordance with sub-section (2) of Section 6 of the Act. Further, the said combination was not covered by the De Minimis Exemption, as explained above. The Commission also noted that the parties has given effect to the combination before the expiry of 210 days from the date of filing of the notice with the Commission or the Commission has passed any order under Section 31 of the Act, whichever is earlier.

17. By failing to give notice to the Commission in accordance with the requirements of sub-section (2) of Section 6 of the Act, the Acquirers are liable for 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.*"

18. As per the details provided, value of the worldwide assets and turnover of the parties to the combination, are as follows:

Party	**Assets (in INR crore)**	**Turnover (in INR crore)**
DiaSys Germany[1] *(including DiaSys India)*	226.55	351.15
Piramal[2]	16,916.29	2,279.94
Total	**17,142.84**	**2,631.09**

[1] INR equivalent of value of assets and turnover of DiaSys Germany denominated in Euro for the financial year ending on 30.09.2013.

[2] For the financial year ending on 31.03.2014.

19. In terms of Section 43A of the Act, the Commission can levy a maximum penalty of one per cent of the combined value of worldwide assets of the parties to the combination i.e. approximately INR 171 crore. However, the Commission has sufficient discretion to consider the conduct of the parties to the combination and the circumstances of the case to arrive at an appropriate amount of penalty. The Commission considered the written as well as oral submissions of the Acquirers while determining the quantum of penalty. Accordingly while considering the totality of factors and applying the principles of proportionality, the Commission considers it appropriate to impose a penalty of INR 2,00,000/- (INR two lakh only) on the Acquirers, which is approximately 0.0001 per cent of the combined value of worldwide assets of the parties to the combination.

20. The penalty is to be paid by the Acquirers jointly and severally within sixty (60) days from the date of receipt of this order.

21. The Secretary is directed to communicate to the Acquirers accordingly.