**16.08.2016**

**Order under Section 43A of the Competition Act, 2002 ("Act") against Clariant Chemicals India Limited in relation to Combination Regn. No. C-2016/02/373**

**Background**

1. On 08.02.2016, the Competition Commission of India (hereinafter referred to as the **"Commission"**) received a notice under Section 6(2) of the Act filed by Clariant Chemicals India Limited ("**CCL**"/ "**Acquirer**"). The said notice was given to the Commission pursuant to execution of a Sale and Purchase Agreement ("**SPA**") between CCL and Lanxess India Pvt. Ltd; **("Lanxess India**"/ "**Seller**") on 31.03.2015 (hereinafter CCL and Lanxess India are collectively referred to as the "**Parties**").

2. The combination relates to acquisition by CCL of Lanxess India's carbon black pigment dispersion business comprising of a plant located in Nagda, Madhya Pradesh (**"Target Business"**), as an on-going concern on a slump sale basis (**"Combination")**.

3. On 11.05.2016, the Commission considered and assessed the Combination and approved the same under Section 31(1) of the Act.

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4. The Commission observed that CCL and Lanxess India executed SPA in relation to the Combination on 31.03.2015 and that the Combination was consummated on the day of execution of the SPA, i.e. on 31.03.2015 itself.

5. In terms of Section 6(2) of the Act, an enterprise, which proposes to enter into a combination, is required to give a 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 Section 6(2A) of the Act, no combination shall come into effect until 210 days have passed from the day on which the notice has been given to the Commission under Section 6(2) or the Commission has passed orders under Section 31 of the Act, whichever is earlier. In view of the above, a show cause notice ("**SCN**") was issued on 02.06.2016 to the Acquirer under Section 43A of the Act read with Regulation 48 of the Competition Commission of India (General) Regulations, 2009 ("**General Regulations**"), requiring it 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 for the Combination in accordance with Section 6(2) of the Act. The Acquirer filed its reply to the SCN on 17.06.2016 ("**Response to SCN**") along with a request for oral hearing, in terms of Regulation 48 of the General Regulations.

6. In its meeting held on 21.07.2016, the Commission considered the Response to SCN and decided to grant an oral hearing to the Acquirer. Accordingly, the Acquirer presented its case before the Commission on 16.08.2016. The Commission noted that the Acquirer made the following submissions:

6.1. The Acquirer, in its internal assessment, carried out at the time of consummation of the transaction, concluded that there was no notification required under the Act as the turnover of the target business was below the *de minimis* thresholds[1]. In this regard, it has also been stated that, CCL, mistakenly, also relied upon Item 3 of Schedule I of The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011[2] ("**Combination Regulations**"). Given the insignificant

[1] In exercise of the powers conferred by clause (a) of section 54 of the Competition Act, 2002 (12 of 2003), the Central Government, in public interest, by way of a notification S.O. 482(E) dated 04.03.2011 (as amended by notification S.O. 1218(E) dated 27.03.2011) had exempted an enterprise, whose control, shares, voting rights or assets are being acquired if it either has either assets of the value of not more than Rs. 250 crores in India or turnover of not more than Rs. 750 crores in India from the provisions of section 5 of the said Act for a period of five years from the date of publication of the notification in the official gazette. The thresholds have been revised to Rs. 350 crores for assets and Rs. 1000 crores for turnover vide notification S.O. 674(E) dated 04.03.2016.

[2] As per Item 3 of Schedule I of the Combination Regulations, following category of combination is ordinarily not likely to cause an appreciable adverse effect on competition in India and notice under sub-section(2) of section 6 of the Act need not normally be filed for the same. *"An acquisition of assets, referred to in sub- clause (i) or sub-clause (ii) of clause (a) of section 5 of the Act, not directly related to the business activity of the party acquiring the asset or made solely as an investment or in the ordinary course of business, not leading to control of the enterprise whose*

size of the asset being acquired, it was felt that the Combination could benefit from said Item 3.

6.2. The Acquirer submitted that Clariant Group (including CCL) has a stringent compliance program in place and the non-compliance of the Act was inadvertent and unintentional. It is further submitted that upon realizing that the Combination was notifiable, CCL, immediately took corrective measures and voluntarily disclosed and notified the same, which clearly shows that CCL had no intention to conceal information or to evade the provision of the Act.

6.3. The Acquirer has submitted that this was the first and only instance of non-compliance by CCL in this regard and there have been no previous instances where the Commission has found the Acquirer to be in violation of the provisions of the Act including the Combination Regulations.

6.4. Based on the aforesaid submissions, the Acquirer has requested the Commission to take a lenient view in this case. It has been submitted that a penalty in the instant case is unwarranted since Clariant Group (including CCL) has already put the necessary mechanism in place to ensure that it is fully compliant with the provisions of the Act and the initial non-compliance was inadvertent and CCL voluntarily took corrective steps to ensure compliance with the Act. The Acquirer also made references to some of the decisions of the Commission[3] in which the Commission has taken a lenient approach when dealing with cases with facts and circumstances similar to the instant case.

7. With respect to the submissions of the Acquirer, as mentioned above, the Commission made the following observations.

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*assets are being acquired except where the assets being acquired represent substantial business operations in a particular location or for a particular product or service of the enterprise, of which assets are being acquired, irrespective of whether such assets are organized as a separate legal entity or not."*

[3] Combination Regn No.C-2013-06-124 (Notice given by Zulia Investments Pte Limited and Kinder Investments Pte Limited; Combination Regn No. C-2013-05-122 (Notice given by Etihad Airways and Jet Airways; C-2014-02-153(Thomas Cook Insurance Services (India) Limited and Sterling Holiday Resorts (India) Limited); and Combination Regn No. C-2015-02-249 (Notice given by Piramal Enterprises Limited).

7.1. The fact of delayed filing and consummation of the Combination before obtaining approval of the Commission in contravention of Section 6(2) of the Act is not disputed by the Acquirer. The Acquirer has only requested the Commission to take a lenient view.

7.2. In this regard, the Commission observed that it had considered and decided on a similar issue in Section 43A proceedings against Zulia Investments Pte Limited and Kinder Investments Pte Limited [4] ("**Zulia case**"). The Commission, in the said case had observed that,

*"…it is expected that the parties must demonstrate a high sense of responsibility in filing combination notifications within the prescribed time limit, after effective and bonafide due diligence. This becomes even more important in view of the fact that sub-section (1) of Section 20 of the Act prevents the Commission from initiating any inquiry after the expiry of one year from the date on which a combination, which has not been notified, takes effect. Therefore, the possibility of a combination which may actually cause appreciable adverse effect on competition (AAEC), escaping the scrutiny of the Commission, in case the parties do not file the mandatory notification, is real and cannot be ruled out notwithstanding any internal systems within the Commission to discover such cases within one year. Even in cases which come to the notice of the Commission before the expiry of this one year, there could be problems in case the combination has been consummated, since restoring the original position may be as difficult as unscrambling an omelette."*

The Commission, in the same decision, had further observed that,

*"The various mitigating factors submitted by the parties have to be, therefore, assessed in the above backdrop of the seriousness of the violation itself. The failure to file cannot be treated as a routine compliance default, as it could potentially have the grave consequence of defeating the very purpose of providing for regulation of combinations. It is, therefore,*

[4] Zulia Investments Pte Limited and Kinder Investments Pte Limited, Combination Regn. No. C-2013-06-124, Order under Section 43A of the Act dated 01.08.2013

*imperative for the companies to understand and appreciate the full extent of their responsibility for complying with the requirement of timely filing of the notifications regarding proposed combinations under sub-section (2) of Section 6 of the Act."*

7.3. Thus, in view of the foregoing, the Commission decided that the request of the Acquirer for not levying any penalty under the provisions of Section 43A of the Act for not giving notice to the Commission within the time prescribed under the provisions of subsection (2) of Section 6 of the Act cannot be accepted and an appropriate penalty needs to be imposed on the Acquirer for non-compliance of the provisions 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 percent of the total turnover or the assets, whichever is higher, of such a combination."*

8. As per the details provided by the Parties, the value of their worldwide assets and turnover are as follows:

| **Party** | **Assets (Rs. Crore)** | **Turnover (Rs. Crore)** |
|---|---|---|
| CCL | 1,842.00 | 1,060.00 |
| Lanxess India | 1,671.00 | 1,731.00 |
| **Combined** | **3,513.00** | **2,791.00** |

9. Accordingly, 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 i.e. Rs.35.13 Crore However, the Commission has sufficient discretion to consider the conduct of the Parties and the circumstances of the case to arrive at an appropriate amount of penalty. Accordingly, while determining the quantum of penalty, the Commission, apart from the size and scale of the Combination, considered the fact that the Acquirer had voluntarily filed the notice with the Commission and that the Acquirer has subsequently

admitted its omission and sought lenient view and pleaded for no penalty. In view of the foregoing, the Commission considered it appropriate to impose a nominal penalty of INR 1,00,000/- (INR One Lakh only) on the Acquirer, which is approximately 0.00002 percent of the combined value of assets of the Parties. The Acquirer shall pay the penalty within sixty (60) days from the date of receipt of this order.

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