COMPETITION COMMISSION OF INDIA

(Combination Registration No.C-2017/02/485)

11.12.2017

Notice given by ITC Limited, pursuant to directions issued under Section 20 (1) of the Competition Act, 2002

CORAM:

Mr. Devender Kumar Sikri

Chairperson

Mr. S. L. Bunker

Member

Mr. Sudhir Mital

Member

Mr. Augustine Peter

Member

Mr. U. C. Nahta

Member

Justice G. P. Mittal

Member

Appearances during oral hearing on 27.07.2017:

For ITC Limited	Mr. Amit Sibal, Senior Advocate
	Mr. G. R. Bhatia, Advocate
	Mr. Abdullah Hussain, Advocate
	Ms. Kanika Nayar, Advocate
	Ms. Nidhi Singh, Advocate
	Ms. Prerna Parashar, Advocate
	Mr. Tahir Siddiqui, Advocate
	Mr. Rohan Alva, Advocate
	Mr. Aditya Gupta, Advocate
	Mr. Sarawswan Mukherjee, Senior Legal Manager
	Mr. Anubhab Dasgupta, Associate Legal Manager

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

Background

1. The Competition Commission of India ("**Commission**"), in its meeting held on 15.01.2016, noted that ITC Limited (hereinafter, referred to as the "**Acquirer**" / "**ITC**") acquired '*Savlon*' and '*Shower to Shower'* trademarks ("**Transaction**") from the Johnson & Johnson Group. However, the said acquisition was not notified to the Commission as required under Section 6 (2) of the Act. Accordingly, the Commission decided to initiate an inquiry under Section 20 (1) of the Act in respect of the Transaction. *Vide* letter dated 11.02.2016, the Acquirer was asked to provide information relating to the value of assets and turnover of the parties to the Transaction along with the copies of the related agreements. *Vide* letter dated 08.03.2016, the Acquirer, *inter alia*, submitted that the Transaction is not an 'acquisition of one or more enterprises' as required under Section 5 read with Section 2 (h) of the Act. The Acquirer finally submitted the requisite information on 03.05.2016, after seeking extension of time.

2. Based on the response of the Acquirer and other information available on record, the Commission, in its meeting held on 14.10.2016, observed that the Transaction meets the notification thresholds prescribed under the Act. The Transaction therefore, appears to be a notifiable combination under the relevant provisions of the Act. Accordingly, in terms of Section 20 (1) of the Act read with Regulation 8 of the Competition Commission of India (Procedure in Regard to the Transaction of Business relating to Combinations) Regulations, 2011 ("**Combination Regulations**"), *vide* letter dated 07.11.2016, the Acquirer was directed by the Commission to file notice in Form I within 30 days of the receipt of the communication. The said decision was taken without prejudice to any penalty proceedings under the

provisions of the Act. The Acquirer filed the notice on 16.02.2017, after seeking extension of time.

3. As per information given in the notice, the Acquirer entered into two separate asset purchase agreements on 12.02.2015, one each with:

   a) Johnson and Johnson Private Limited (**J&J India** or **Seller 1**) for the purchase of trademark '*Savlon*' along with certain attendant inventories, know-how, molds and promotional material (**Transaction 1**); and

   b) Johnson and Johnson Pte Ltd. (**J&J Singapore** or **Seller 2**) for the purchase of trademark '*Shower to Shower*' along with certain attendant inventories, know-how, molds and promotional material (**Transaction 2**).

   (Hereinafter, Seller 1 and Seller 2 are collectively referred to as the "**Sellers**")

4. In its meeting held on 22.03.2017, the Commission considered and assessed the combination and approved the same by passing an order under Section 31 (1) of the Act. The said order was passed without prejudice to any proceedings under Section 43A of the Act.

Proceedings under Section 43A

5. As already stated, acquisition of '*Savlon*' and '*Shower to Shower'* trademarks along with other related assets by the Acquirer was a combination in terms of Section 5 of the Act and ought to have been notified to the Commission in accordance with Section 6 (2) of the Act. It was also noted from the submissions of the Acquirer that the combination was already consummated before the expiry of time provided under Section 6 (2A) of the Act.

6. In view of the foregoing, it *prima facie* appeared that the Acquirer not only failed to give notice of the combination to the Commission within the

stipulated time period as provided under Section 6 (2) of the Act but also effected the same before the expiry of 210 days from the day on which the notice was given to the Commission or an order was passed by the Commission under Section 31 of the Act, whichever is earlier, in contravention of Section 6 (2) read with Section 6 (2A) of the Act. Therefore, in its meeting held on 22.03.2017, the Commission decided to issue a show cause notice to the Acquirer under Section 43A of the Act read with Regulation 48 of the Competition Commission of India (General) Regulations, 2009 ("**General Regulations**"). Accordingly, a show cause notice dated 29.03.2017 ("**SCN**"), was issued to the Acquirer to explain, in writing, within 15 days of the receipt of such communication as to how it has not contravened the provisions of Section 6 (2) read with Section 6 (2A) of the Act and why penalty, in terms of Section 43A of the Act, should not be imposed upon it . The Acquirer filed its response on 28.04.2017with the Commission, after seeking extension of time.

7. The Commission, in its meeting held on 28.06.2017, considered the matter and decided to grant an oral hearing to the Acquirer, as per its request. The Commission heard the authorized representatives of the Acquirer on 27.07.2017. Pursuant to the oral hearing, the Acquirer filed written submissions on 09.08.2017 detailing the arguments made before the Commission during the oral hearing. The Commission notes that, *vide* written and oral submissions, the Acquirer has, *inter alia*, made the following submissions:

7.1 That a combined reading of Section 2 (h) and Section 5 of the Act suggests that only the acquisition of an enterprise (including a 'person'), as defined under the Act, would amount to a combination. It is essential that for a transaction to qualify as 'combination', there is acquisition of an 'enterprise'. A trademark is not an enterprise or a 'person' as defined in Section 2 (l) of the Act or in Section 2 (42) of the General Clauses Act,

1897. Therefore, considering the scheme of the Act, including a harmonious reading of Section 2 (h), 2 (l) and Section 5, purchase of trademarks (including incidental rights, property and/ or interests), would not tantamount to "*acquisition of an enterprise*" as envisaged under Section 5 of the Act and hence, the same cannot be a 'combination' under the Act. In support of its arguments, the Acquirer has referred to judgment of the Hon'ble Supreme Court of India *in Competition Commission of India v. Coordination Committee of Artistes and Technicians of West Bengal Films and Television.*

7.2 That ITC has not acquired the entire business of the products sold under the '*Savlon*' and '*Shower to Shower*' trademarks, but rather has merely purchased the said trademarks and incidental rights, property and/ or interests. Further, ITC has acquired neither any immovable property or manufacturing facility under Transaction 1 and/ or Transaction 2 nor business of the products sold under the '*Savlon*' and '*Shower to Shower*' trademarks. Also, the agreements did not impose any non-compete restrictions and the Sellers are still entitled to continue the business of the products sold under the trademarks. Therefore, Transaction 1 and/ or Transaction 2 do not fall within the ambit of Section 5 of the Act and as such, no obligation is created under Section 6 of the Act to notify the Transaction to the Commission.

7.3 That without prejudice to the contention that Transaction 1 and/ or Transaction 2 do not fulfil the definitional criterion laid down in Section 5 of the Act, said transactions fall within the scope and ambit of Item 3 of Schedule I of the Combination Regulations, 2011. Regulation 4 of the Combination Regulations, 2011 states that certain categories of combinations which are specified in Schedule I are ordinarily not likely to cause an appreciable adverse effect on competition (AAEC) and hence, notice with respect to such transactions need not normally be filed. In the

present matter, purchase of the afore-mentioned trademarks was not directly related to the business activity of ITC as it was not present in the relevant markets, was in the ordinary course of business of ITC and does not give ITC any control over the enterprise from whom the trademarks were acquired. Therefore, though satisfaction of only one criterion is necessary for ITC to be exempted from filing the notice, all the criteria prescribed under Item 3 of Schedule I of the Combination Regulations are fulfilled.

7.4 That the monetary thresholds that ought to be considered are the relevant figures attributable to the trademarks purchased by ITC. Under the Act, since an enterprise *i.e.*, a person carrying on business has to be acquired in order to come within the definition of 'combination', the thresholds specified under Section 5 are also in terms of the value or size of the 'combination'. Therefore, if the purchase of the trademarks *simpliciter* is to be treated as a 'combination', then the relevant asset value and turnover to be considered for the purposes of the threshold are the value of the trademarks purchased and the turnover of the products attributable to such trademarks. The form of legal entity in which the acquired assets reside should not merit a difference in treatment under competition law. Competition law cannot be said to favour use of incorporated subsidiaries over unincorporated business divisions.

7.5 That the Ministry of Corporate Affairs *vide* notification no. S.O. 988 (E) dated 27.03.2017 ("**New *De Minimis* Notification**") has clarified that the size of the asset being acquired is relevant for assessing notifiability of the transaction under the Act and not the size of the party from whom the asset is being acquired. The said notification provides that:

> *"2. Where a* ***portion of an enterprise or division or business is being acquired, taken control of, merged or amalgamated with***

another enterprise, the value of assets of the said portion or division or business attributable to it, shall be the relevant assets and turnover to be taken into account for the purpose of calculating the thresholds under Section 5 of the Act."

(emphasis supplied)

This, in effect, means that while assessing notifiability of a transaction, the first assessment would be to ascertain if the assets and turnover of the relevant business being acquired (as against the assets and turnover of the Target entity) breach Rs. 350 crores in assets and Rs. 1000 crores, respectively.

7.6 That the New *De Minimis* Notification, being clarificatory to the *De Minimis* notifications dated 04.03.2011 and 04.03.2016, would have retrospective operation and therefore, would apply to the pending proceedings under the Act. In support of its arguments, the Acquirer has referred to various judgments of the Hon'ble Supreme Court of India *in Commissioner of Income Tax v. Gold Coin Health Food Private Limited, (2008) 9 SCC 622; Commissioner of Income Tax v. Vatika Township Private Limited, (2015) 1 SCC 1* and *Government of India and Others v. Indian Tobacco Association, (2005) 7 SCC 396.*

7.7 Further, the press release dated 30.03.2017 of the Ministry of Corporate Affairs issued along with the notification also states that the notification is clarificatory in nature. Therefore, considering the relevant turnover of the products attributable to the trademarks purchased, Transaction 1 and Transaction 2 fall within the ambit of the *De Minimis* Exemption (*i.e.* notification S.O. 482 (E) dated 04.03.2011), which exempts 'an enterprise whose control, shares, voting rights or assets are being acquired if it either has assets of the value of not more than Rs. 250 Crores in India or turnover of not more than Rs.750 Crores in India'.

7.8 That the clarification provided *vide* the above said notification came prior to the issuance of the SCN dated 29.03.2017 and therefore, ITC is entitled to draw benefit from the same. Further, the penalty under Section 43A of the Act applies only to a person who fails to give notice under Section 6 (2) of the Act. In the present case, ITC had filed the notice in Form I as directed by the Commission much before the issuance of the SCN dated 29.03.2017. To attract the penal provisions under Section 43A, the offence or the act complained of should have been subsisting at the time of issuing the SCN, which is clear from the language employed in the Section ('any person who fails to'). At the time of the SCN, it cannot be said that ITC was a '*person who fails to give notice'* as contemplated under Section 43A. Therefore, Section 43A cannot be invoked in respect of an act which has already been completed and is no longer a failure at the time of issuance of the SCN. In this regard, the Acquirer has referred to judgment of the Hon'ble Supreme Court of India in *Commissioner of Central Excise v. M/s Krishna Cylinders, Appeal No. ST/ 222/ 2009-CU (DB).*

7.9 That in accordance with the directions of the Commission, ITC filed notice in Form I which was accepted by the Commission. The Commission also approved Transaction 1 and Transaction 2 after holding that the said transactions did not raise any AAECin the relevant markets in India, by passing an order dated 22.03.2017 under Section 31 (1) of the Act. In the circumstances, the delay, if any, on the part of ITC in not filing Form I was condoned by the Commission. Therefore, at the time of issuance of SCN, there was no default on the part of ITC to notify. Accordingly, penalty should not be imposed on ITC under Section 43A of the Act.

7.10 That ITC reasonably believed that at the time of entering into Transaction 1 and Transaction 2, there was no requirement to file an application under Section 6 of the Act, and this belief is stated to be fortified by the reading

of the provisions of the Act, as well as transactions of similar nature in respect of which also, no application under Section 6 was made to the Commission. Therefore, ITC had acted in a *bona fide* manner and there was no wilful failure or neglect or any contumacious conduct, which requires imposition of any penalty on ITC.

7.11 That in relation to applicability of penal provisions and imposition of penalty, the Hon'ble Supreme Court of India has taken the view that penalties should not be imposed on parties who have taken a view and acted on *bona fide* and reasonable belief. In this regard, the Acquirer has referred to various judgments of Hon'ble Supreme in *Hindustan Steel Limited v. State of Orissa, (1969) 2 SCC 627; J.K. Synthetics Limited v. Commercial Taxes Officer, (1994) 4 SCC 276; Karnataka Rare Earth v. Senior Geologist, Department of Mines and Geology, (2004) 2 SCC 783, Sanjay Industrial Corporation v. CCE, Mumbai, (2015) 14 SCC 639; Commissioner of Central Excise, Calcutta-II v. India Aluminium Company Limited, (2010) 15 SCC 167; EID Parry (I) Limited v. Asst. Commissioner of Commercial Taxes, (2000) 2 SCC 321, Cement Marketing Company of India Limited v. Asst. Commissioner of Sales Tax, Indore, (1980) 1 SCC 71* and *Uniflex Cables Limited v. Commissioner, Central Excise, Surat-II, (2011) 14 SCC 568*; of the Hon'ble erstwhile Competition Appellate Tribunal ("**CompAT**") in *Thomas Cook (India) Limited and Others v. Competition Commission of India, (2015) Comp. L.R. 953* and *A.R. Polymers Private Limited v. Competition Commission of India, Appeal Nos. 34*; and of the Hon'ble High Court of Delhi in *Commissioner of Income Tax-IV v. Fortis Financial Services Limited, ITA Nos. 243/2011 and 244/2011*. In the present case, the purported violation is based on a reasonable and *bona fide* belief of ITC that Transaction 1 and/ or Transaction 2 were not notifiable under Section 6 of the Act. Further, ITC cannot be said to have acted in a contumacious, dishonest or deceptive manner, nor it has acted deliberately in defiance of law or acted in

conscious disregard of its obligations. Therefore, the Commission should not levy any penalty on ITC in respect of notification of Transaction 1 and/ or Transaction 2.

7.12 That the dissent note dated 14.07.2016 in the order passed under Section 43A in the case of *Sundaram Finance Limited*, *C-2015/03/257*, was expressive of the intent of the Commission to not impose penalties in cases of default under the previous unamended provision/ exemption, when the same act would not result in contravention of the amended provision which removes the requirement of notice as on the date of hearing. In the said case, the dissent note found a delay of more than 3 months in filing the notice, but no penalty was imposed under Section 43A of the Act. The Commission, as a matter of principle, decided that penalty should not follow in such cases and the said principle should not be ignored on the basis that the same emanates from the minority, as there was no dissent on the quantum of penalty from the majority. This is also the case in the present matter since the acquisition by ITC of the trademarks, if it were to happen today, is exempt under the New *De Minimis* Notification dated 27.03.2017.

8. In addition to above, the Acquirer has submitted that the Commission may consider the following mitigating circumstances:

8.1 At the time of signing of agreements, there was no order of the Commission that clarified that in the case of mere acquisition of trademarks, the assets and turnover of the seller entity had to be taken into consideration.

8.2 There was no reason for ITC to conceal Transaction 1 and/ or Transaction 2 or their details from any scrutiny by the Commission.

8.3 ITC has demonstrated its good conduct right from the receipt of the first communication from the Commission in February 2016, and has responded to all the communications received from the Commission.

8.4 It has never been the intent of ITC to act deliberately in defiance of the law or in conscious disregard of its 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.

8.5 There was no non-compete clause in either the agreement for Transaction 1 or the agreement for Transaction 2. Hence, there was no impediment on healthy competition in the market.

9. The Commission has carefully perused the written as well as oral submissions of the Acquirer. Before going into examination of this issue, it would be appropriate to refer to the various provisions of the Act. 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 –*
> *Any acquisition where*
> *(a) The parties to the acquisition, being the acquirer and the enterprise whose control, share, voting rights or assets have been acquired or are being acquired jointly have, -*
> *(A).....*
> *(B)....*
> *……"* (emphasis added)

Section 6 (2) 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"*

Section 6 (2A) 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."*

Thus, any merger or acquisition which meets the jurisdictional thresholds prescribed by Section 5 of the Act in terms of the value of assets and turnover of the parties concerned is a notifiable combination. In terms of Section 6 (2) 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 Section 6 (2A) 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 date on which the Commission has passed any order under Section 31 of the Act, whichever is earlier.

10. The Commission notes that based on the value of assets and turnover of the parties to the combination as provided by the Acquirer, on the date of the agreement, acquisition of '*Savlon*' and '*Shower to Shower'* trademarks along

with other related assets by the Acquirer from Seller 1 and Seller 2 met the jurisdictional thresholds prescribed by Section 5 (a) (i) (A) of the Act. Accordingly, such acquisition of trademarks *i.e.* assets is a notifiable combination in terms of Section 6 (2) of the Act. The Commission also notes that the benefit of Regulation 4 read with Item 3 of Schedule I of the Combination Regulations as well as *De Minimis* Exemption dated 04.03.2011 are not available in the present matter, for the reasons explained in the succeeding paragraphs.

11. With respect to the written and oral submissions of the Acquirer as mentioned above, the Commission observed as under:

11.1 The Acquirer contended that acquisition of trademarks does not tantamount to 'acquisition of an enterprise' as required under Section 5 of the Act and therefore, the same cannot be a combination notifiable under the Act. However, the Commission observes that Section 5 (a) (i) of the Act provides that an acquisition, where the parties to an acquisition, being the acquirer and the enterprise whose control, share, voting rights or assets have been acquired or are being acquired jointly meet the prescribed thresholds, will be a combination. Accordingly, any acquisition where the acquirer enterprise and the enterprise whose assets/ control/ voting rights/ shares have been acquired jointly meet the prescribed thresholds, the combination becomes reportable under Section 6 (2) of the Act. Thus, a plain reading of Section 5 (a) (i) of the Act implies that acquisition of assets of an enterprise would also be a combination if the prescribed thresholds are met.

11.2 Further, the definition of '*acquisition*' under Section 2 (a) of the Act provides that:

"*acquisition*" means, "*directly or indirectly, acquiring or agreeing to acquire –*

(i) shares, voting rights or ***assets*** *of any enterprise; or*

(ii) control over management or control over assets of any enterprise" (emphasis added)

Accordingly, Section 2 (a) read with Section 5 of the Act states that a combination includes not only acquisition of an enterprise as a whole but also acquisition of assets of an enterprise. Therefore, acquisition of certain assets housed within an enterprise in the form of a division, department or otherwise would also attract the provisions of Section 5 of the Act.

11.3 With regard to the argument of the Acquirer that acquisition of mere trademarks of an enterprise does not amount to acquisition of 'assets', the Commission observes that trademarks are considered an asset as they provide economic value to their owners. Similar treatment has been given to trademarks under the Act also. Explanation (c) of Section 5 of the Act, which reads as under, provides that under competition law also, trademarks are an asset which have to be considered while determining thresholds under the provisions of the Act:

"the value of assets shall be determined by taking the book value of the assets as shown, in the audited books of account of the enterprise*, in the financial year immediately preceding the financial year in which the date of proposed merger falls, as reduced by any depreciation, and the* ***value of assets shall include*** *the brand value, value of goodwill, or* ***value of*** *copyright, patent, permitted use, collective mark, registered proprietor,* ***registered trade mark****, registered user, homonymous geographical indication, geographical indications, design or*

layout-design or similar other commercial rights, if any, referred to in sub-section (5) of Section 3." (emphasis added)

Thus, acquisition of trademarks is an acquisition of assets in terms of Section 5 (a) of the Act and is a combination if the jurisdictional thresholds are met. The interpretation taken by the Acquirer that for a transaction to qualify as a combination, there should be acquisition of an enterprise, would not only go against the provisions of the Act as explained in the previous paragraphs but would also defeat the purpose of combination regulation in India. If such an interpretation were to be accepted, all parties may structure their transaction in such a manner that all the assets of an enterprise would be transferred without actually transferring the ownership of the enterprise itself and the transaction will not be reportable to the Commission for scrutiny. This interpretation will render the provisions of the Act nugatory, which is clearly not the intent of the legislation.

11.4 The Commission also observes that acquisition of immovable properties or manufacturing facilities is not a pre-requisite for attracting Section 5 of the Act, as assets includes not only tangible assets but also intangible assets, in the form of intellectual property rights *viz*. trademarks.

11.5 The Acquirer also contended that there is no non-compete covenant imposed on the Sellers. In this regard, the Commission is of the view that absence or presence of a non-compete covenant in the transaction agreement is inconsequential as far as determination of notifiability of a transaction under Sections 5 and 6 of the Act is concerned.

11.6 As regard the submissions of the Acquirer that the Transaction falls within the scope and ambit of Item 3 of Schedule I of the Combination

Regulations, the Commission deems it appropriate to refer to Item 3 of Schedule I of the Combination Regulations which reads as under:

> *"An acquisition of assets…….**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 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."* (emphasis added)

The Commission notes that although the Acquirer did not operate in the business of antiseptic liquid or antibacterial soap/ hand wash or prickly heat powder in respect of which the acquired trademarks were being used, it was operating in the field of personal care products, which includes antiseptic liquid or antibacterial soap/ hand wash or prickly heat powder. Thus, the argument of the Acquirer that the acquisition of trademarks is not directly related to its business activities cannot be accepted. Moreover, purchase of intellectual property of a competitor by a business enterprise cannot be construed as being a transaction in the ordinary course of its business. ITC is, *inter alia,* engaged in the business of selling personal care products and not in the business of selling/ purchasing intellectual property rights related to those products.

11.7 The Commission, in its order dated 10.02.2015, passed under Section 43A of the Act in Case No. C-2014/05/175 involving *SCM Soilfert Limited,* observed that:

"……..*the categories of combinations listed in Schedule I to the Combination Regulations must be interpreted in light of the Commission's objectives (listed in Section 18 of the Act) and the intent of Schedule I (expressed in Regulation 4 of the Combination Regulations). This means that the categories of combinations listed in Schedule I as normally not notifiable ought not to include combinations which envisage or are likely to cause a change in control or are of the nature of strategic combinations including those between competing enterprises or enterprises active in vertical markets*." (emphasis added)

Accordingly, the Commission is of the considered opinion that acquisition of trademarks is directly related to the business activity of the Acquirer and hence, not made solely as an investment or in the ordinary course of business. Thus, the benefit of Item 3 of Schedule I of the Combination Regulations is not available to the Acquirer in the present matter.

11.8 The Acquirer also submitted that the value of the relevant asset or relevant turnover of the products sold under the trademarks acquired, should be taken into account for checking the thresholds, by placing reliance on the judgment of the Hon'ble Supreme Court of India in *Excel Crop Care Limited v. Competition Commission of India and Others, (2017) 8 SCC 47*. The Commission notes that, as on the date of execution of the agreements for the purpose of Transaction 1 and Transaction 2, in terms of Section 5 (a) (i) of the Act, the value of the assets and turnover of the parties to the acquisition *i.e.* the acquirer and the enterprise whose assets are being acquired, have to be taken into consideration for the purpose of calculation of thresholds, and not the value of assets and turnover attributable to the product being acquired.

This position has been changed only after New *De Minimis* Notification, as discussed below.

11.9 The Acquirer also contended that the New *De Minimis* Notification is clarificatory in nature and therefore, it should have retrospective application. In this regard, the Commission notes Transaction 1 and Transaction 2 took place on 12.02.2015; as such, the obligation to notify the same under Section 6 (2) of the Act arose within 30 days. At that point in time, *De Minimis* Notification No. SO 482 (E) dated 04.03.2011, as amended by Corrigendum No. SO 1218 (E) dated 27.05.2011, was in force which reads as under:

> *"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, hereby exempts an enterprise, whose control, shares, voting rights or assets are being acquired has either assets of the value of not more than Rs. 250 crore in India or turnover of not more than Rs. 750 crore in India from the provisions of section 5 of the said Act for a period of five years."*

Thus, going by plain reading of this notification, the value of the assets and turnover to be considered for determining applicability of the said notification was that of the enterprise itself and not of the assets being acquired, as claimed by the Acquirer in the present matter. The Commission notes that based on the value of assets and turnover of the Sellers (whose assets were acquired) as provided by the Acquirer, the acquisition of '*Savlon*' and '*Shower to Shower'* trademarks along with other related assets by the Acquirer from the Sellers, does not qualify for the *De Minimis* Notification dated 04.03.2011.

11.10 In relation to the contention of the Acquirer that the New *De Minimis* Notification is clarificatory in nature and therefore, would have retrospective operation, the Commission observes that the said notification seeks to substantively change not only the manner in which the value of assets and turnover (of the target entity) is determined for the purpose of Section 5 of the Act but also the principle for determining the applicability of *De Minimis* Exemption itself. The very fact that the said notification has a life span of only 5 years strengthens the view that it is not clarificatory in nature and hence, do not have retrospective application.

11.11 A recent judgment of the Hon'ble Supreme Court in *Union of India and Others v. IndusInd Bank Limited and Others, (2016) 9 SCC 720* indicates that when changes in law are "*substantive changes in the law*", then these are *"remedial in nature and cannot have retrospective effect*".

11.12 Further, the Constitutional Bench of the Hon'ble Supreme Court in *Shyam Sunder and Another v. Ram Kumar and Another, (2001) 8 SCC 24***,** held as under:

> *"In Maxwell on the Interpretation of Statutes, 12th Edn. the statement of law in this regard is stated thus:*
>
> ***"Perhaps no rule of construction is more firmly established than thus – that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it***

ought to be construed as prospective only." *The rule has, in fact, two aspects, for it, "involves another and subordinate rule, to the effect that a statute is not to be construed so as to have a greater retrospective operation than its language renders necessary."* (emphasis supplied)

11.13 The Commission further observes that the Hon'ble Supreme Court in *Commissioner of Income Tax v. Vatika Township Private Limited, (2015) 1 SCC 1* (which has been relied upon by the Acquirer itself) states that:

> "*legislations which modified accrued rights or which impose obligations or impose new duties or attach a new disability have to be treated as prospective unless the legislative intent is clearly to give the enactment a retrospective effect*".

11.14 The Commission also notes that nowhere it is stated in the New *De Minimis* Notification that operation of the said notification is retrospective in nature. The substantive changes brought about by the said notification cannot be construed as retrospective in nature, as it would otherwise create chaos, and perhaps lead to opening of all the old closed transactions for fresh scrutiny as per the new notification particularly, interpreting the term 'turnover'. In view of the above, the judgments cited by the Acquirer do not hold any water.

11.15 The Acquirer seeks to bolster its claim that the New *De Minimis* Notification is clarificatory in nature by citing the press release dated 30.03.2017. However, in this regard, the Commission from the judgment of the Hon'ble Supreme Court in *Commissioner of Income Tax, Mumbai v. Anjum M.H. Ghaswala and Others, (2002) 1 SCC 633,*

notes that a press release does not have statutory force as that of a notification and therefore, cannot alter the statutory position prescribed by law.

11.16 The Acquirer also contended that benefit from the New *De Minimis* Notification dated 27.03.2017 can be availed by it as the SCN was issued by the Commission subsequently *i.e.* on 29.03.2017. The Acquirer also contended that Section 43A of the Act can be attracted only if the offence is subsisting at the time of issuing of the SCN. However, the Commission notes that the trigger documents in the present case were executed on 12.02.2015. Under Section 6 (2) of the Act, the Acquirer is under an obligation to file notice pertaining to an acquisition/ merger within a period of 30 days of the execution of a trigger document. Therefore, the notice under Section 6 (2) of the Act ought to have been filed by the Acquirer with the Commission within 30 days from 12.02.2015, *i.e.* by 12.03.2015. The cause of action for initiation of present Section 43A proceedings therefore, arose from 12.03.2015 onwards, notwithstanding the fact that the SCN was issued on 29.03.2017. Accordingly, the relevant date to be considered for determination of violation of Section 43A of the Act is 12.03.2015 *i.e.* when the 30-days period to file notice with the Commission expired and not 27.03.2017 when the SCN was issued. The fact that the Commission directed the Acquirer to file a notice in Form I with the Commission *vide* its letter dated 07.11.2016 is suggestive of the fact that contravention of Section 6 (2) crystallised on 12.03.2015 itself. In view of above, the contention of the Acquirer that benefit of the clarification in the form of the New *De Minimis* Notification dated 27.03.2017, which came prior to the issuance of the SCN, is available to it, cannot be accepted.

11.17 As regards the contention of the Acquirer that the Commission did not find any AAEC to raise any competition concern, it is observed that Section 5 of the Act sets out the conditions for notifiability, including the thresholds. When the conditions of notifiability are satisfied, a notice of the 'proposed' combination has to be given to the Commission within 30 days of entering into binding document as per Section 6 (2) of the Act. After receipt of the notice, the combination is assessed, based on the parameters set out in Section 20 (4) of the Act, to determine the AAEC. A finding by the Commission that the combination has not resulted or is not likely to result in any AAEC, does not absolve the Acquirer/ parties to the combination from filing the notice before the Commission. Unless and until the notice is filed with the Commission, the assessment of the combination in terms of Section 20 (4) of the Act cannot be completed.

11.18 The Commission in its order dated 09.06.2017 passed under Section 43A of the Act, in *Future Consumer Enterprise Limited, C-2016-03-384,* has held that:

> *"The fact of approval of the combination on assessment that it does not raise any AAEC in India, based on analysis of various factors does not confer any immunity to the appellants from being penalized under Section 43A of the Act for failure to comply with the regulatory obligation (s) of the party (ies) under the Act. Moreover, the Act clearly provides, irrespective of whether there is any AAEC or not, mandatory regime for notifying a combination to the Commission."*

11.19 The issue relating to validity of penalty proceedings under Section 43A of the Act, when the transactions which were not notified, admittedly did not have AAEC, has also been considered by the erstwhile Hon'ble

erstwhile CompAT, in the case of *SCM Soilfert Limited and Others v. Competition Commission of India, (2016) Comp. L.R. 1111* ("**SCM Case**"), wherein it has been held that:

> *"Sections 31 and 43A of the Act operate in two different fields. The Commission has the power to approve a combination under Section 31 and such approval neither obliterates nor condones the contravention, for which penalty is to be imposed under Section 43A. Approval under Section 31 is not even listed as a mitigating circumstance under Regulation 48 of the General Regulations which deals with the procedure for imposition of penalty. Accordingly, in our view Penalty under section 43A of the Act is leviable even if the combination has no appreciable adverse effect on competition".*

11.20 With regard to the contention of the Acquirer that transactions of similar nature reported in media were not notified to the Commission, the Commission notes that one of those transactions occurred prior to the notification of provisions of Sections 5 and 6 of the Act and in the other instances referred by the Acquirer, the target entities *i.e.* sellers seems to be exempt under the previous *De Minimis* Notifications. Notwithstanding above, non-filing of notice in those transactions does not absolve the Acquirer of its own obligation to notify Transaction 1 and Transaction 2 to the Commission under Section 6 (2) of the Act.

11.21 The Acquirer further contended that by passing the order dated 22.03.2017, the Commission has condoned the delay, if any, in filing of the notice. In this regard, the Commission notes that in its order dated 22.03.2017 passed under Section 31 (1) of the Act, it has been specifically written in Para 12 that "*This order is issued without prejudice to the proceedings under Section 43A of the Act*." The

direction issued by the Commission dated 07.11.2016 to file notice in Form I was also issued without prejudice to the proceedings under Section 43A of the Act. Moreover, the Acquirer cannot take advantage of the proceedings initiated by the Commission to plead that by filing Form I as directed by the Commission, contravention, if any, on its part, has been condoned by the Commission.

11.22 As regards the contention of the Acquirer that it acted in a *bona fide* manner and there was no wilful failure, the Commission notes that in the instant case the Acquirer has not only delayed in filing a notice with the Commission but rather failed to file the notice with the Commission. In the event that the Commission would not have taken *suo moto* cognizance of the combination, it would have escaped the scrutiny of the Commission to determine whether the said combination has resulted in any AAEC 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. Hence, the judgments cited by the Acquirer do not apply to the present case.

11.23 The Hon'ble Supreme Court, in *The Chairman, SEBI v. Shriram Mutual Fund and Another, (2006) 5 SCC 361,* has held 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…"

11.24 The Acquirer also made certain averments with reference to the decision of the Commission in *Sundaram Finance Limited (supra).* In this regard, the Commission notes that the facts of the two cases are entirely different and accordingly, the principle laid down in that case is not applicable in the present matter, for two reasons. *Firstly*, in the case of *Sundaram Finance Limited*, the parties filed the notice voluntarily pursuant to the provisions of the Act, though after a delay of three months. However, , in the present matter, the Acquirer failed to give notice as per the provisions of the Act at the time of entering into a binding agreement and the notice was filed in response to a direction of the Commission. *Secondly*, the Acquirer is primarily relying on minority opinion, which does not have a binding force.

12. The Commission also notes that in violation of Section 6 (2A) of the Act, the parties have given effect to the combination before the expiry of 210 days from the date of filing of the notice with the Commission or passing of an order by the Commission under Section 31 of the Act, whichever is earlier. In this regard, the Commission observes that *vide* its order dated 08.03.2016 passed under Section 43A of the Act in *Baxalta Incorporated C-2015-07-297*, it has held that:

"…the words "proposes" and "proposed" used in sub-section (2) of Section 6 have to be read in the context of sub-section (2A) of Section 6 (which suspends the consummation of the proposed combination for the period stated therein). Accordingly, till the expiry of the 210 days from the date of filing of the notice or the Commission has passed an order under Section 31 of the Act, whichever is earlier, a combination should remain a proposed

combination and parties to the combination should not give effect to the combination. If the parties to the combination are allowed to give effect to the proposed combination either before filing of the notice with the Commission or after filing of the notice but before the expiry of the period given in sub-section (2A) of Section 6 of the Act, then it will tantamount to violation of sub-section (2) of Section 6 of the Act.

This view has been held by the Commission in other cases as well.

13. Further, the Hon'ble erstwhile CompAT, while adjudicating the issue relating to *ex-ante* nature of notification under Section 6 (2) of the Act, in the SCM Case has observed:

> *"The ex-ante nature of notification under Section 6 (2) is buttressed by a reading of Sec. 6 (2A) which deliberately used the phrase "no combination shall come into effect" until 210 days from date of notice, or passing of order under Sec. 31."*

14. Further, the Hon'ble erstwhile CompAT, in the SCM Case, also pointed out why *ex-ante* notification is critical to the regulation of combinations. It observed:

> *"It is essential that the Commission receive prior / ex-ante Notification of proposed combinations in order for it to effectively prevent anti-competitive acquisitions and mergers. A contrary reading of the Section so as to permit ex post facto notification would render the same nugatory.* ***Unless the Commission has a chance to examine the anti-competitive effects of the proposed combination before it is consummated, it will lead to a scenario***

where an anti-competitive acquisition has already been given effect to thereby making unravelling of the transaction complex, or in some cases impossible *where the acquisition of shares was done from the open market, as the sellers of the shares in such cases are anonymous and the shares."* (emphasis supplied)

15. Hence, based on the aforesaid observations of the Commission in *Baxalta Incorporated* and of the Hon'ble erstwhile CompAT in SCM Case, it is implied that a combined reading of the standstill obligations of the parties to a combination, as envisaged under Section 6 (2) and 6 (2A) of the Act, is considered as the cornerstone of *ex-ante* combination regulation. Therefore, consummating the combination, before filing notice or after filing notice but before the expiry of period specified under Section 6 (2A) of the Act, will violate the *ex-ante* nature of regulation of combinations in India.

16. In view of the foregoing, the Commission is of the considered view that the Acquirer has contravened the provisions Section 6 (2) read with Section 6 (2A) of the Act, 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.*"

17. 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 Acquirer, the Commission deems it appropriate to impose a penalty of Rs. 5,00,000/- (Rupees Five Lacs Only) on the Acquirer.

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

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