03.07.2018

Proceedings under Section 43A of the Competition Act, 2002 against Telenor ASA, Telenor (India) Communications Private Limited and Telenor South Asia Investments Pte Limited

CORAM:

Mr. Sudhir Mital
Member

Mr. Augustine Peter
Member

Mr. U. C. Nahta
Member

Mr. G. P. Mittal
Member

Appearances during oral hearing on 03.07.2018 for parties:

Mr. Ramji Srinivasan, Sr. Advocate, Mr. Rahul Rai, Advocate, Ms. Aditi Gopalakrishnan, Advocate, Ms. Arunima Chatterjee, Advocate, Mr. Pankaj, Telenor

Order under Section 43A of the Competition Act, 2002

A. Background and initiation of proceedings under Section 43A of the Act

1. On 26.10.2012, the Competition Commission of India ("**Commission**") received a notice ("**Notice**") under Section 6(2) of the Competition Act, 2002 ("**Act**"), given by Lakshdeep Investments & Finance Private Limited ("**Lakshdeep**") (Combination Registration No. C-2012/10/87). The Notice related to proposed acquisition of shares of Telewings Communications Services Private Limited (now Telenor (India) Communications Private Limited, hereinafter referred to as "**Telewings**" / "**Telenor India**") by Lakshdeep

("**Combination**") and was filed pursuant to the execution of a Share Subscription and Shareholders' Agreement ("**SSHA**") dated 26.10.2012 between Telenor South Asia Investment Pte Limited ("**Telenor South Asia**"), an indirect wholly owned subsidiary of Telenor ASA ("**Telenor**", the ultimate holding company of Telenor Group), Lakshdeep and Telewings.

2. As per the details provided in the Notice, the Combination envisaged Lakshdeep to initially acquire 51 percent shares in Telewings and ultimately hold 26 percent shares in Telewings. It was also stated in the Notice that the investment by Lakshdeep was envisaged to take place in the following four steps:

(i) **Step I:** Telewings' participation in the 2G spectrum auction to be conducted by the DoT from 12.11.2012 with an intention to acquire the necessary spectrum for carrying telecommunication operations in India;

(ii) **Step II**: Upon Telewings being declared successful in the 2G spectrum auction, Lakshdeep's acquisition of 51 percent shares of Telewings ("**Lakshdeep Share Transaction**");

(iii) **Step III**: After acquiring the 2G spectrum and requisite licenses necessary for carrying on the business operations in India, Telewings' acquisition of business of Unitech Wireless (Tamil Nadu) Private Limited ("**Uninor**") on a going concern basis ("**Uninor Business Transaction**"); and

(iv) **Step IV**: On receiving the approval of the Foreign Investment Promotion Board ("**FIPB**"), Telenor to increase its shareholding to 74 percent and consequently Lakshdeep to hold 26 percent in Telewings ("**Telenor Share Transaction – Tranche 1**").

3. It was stated in the Notice that the aforesaid four steps of the proposed investment are inter-connected and accordingly the notice was being filed under Regulation 9(4) of the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 ("**Combination Regulations**"). However, it was also claimed that aforesaid Step III *i.e.,* Uninor Business Transaction and Step IV *i.e.,* Telenor

Share Transaction – Tranche 1 are intra-group asset transfer and intra-group acquisition of shares respectively in terms of Regulation 4 read with Item 8 of Schedule I of the Combination Regulations and need not normally be filed with the Commission.

4. During the review of the Combination, considering the aforesaid submissions on Step III and IV, Lakshdeep was asked to clarify the scope of the Notice, in particular the steps/transactions for which the approval of the Commission was being sought including whether the approval was being sought for Step III and Step IV. In response, Lakshdeep submitted that the scope of the Notice is the acquisition of 51 percent stake by Lakshdeep in Telewings (and the resultant transfer of telecom assets from Uninor to Telewings). Further, it was stated that the parties to the Combination believe that Step III and Step IV need not normally be filed and accordingly, Step III and Step IV do not require the Commission's approval. It was added that in any event, if the Commission is of a different view, then an assessment of appreciable adverse effect on competition ("**AAEC**") in the relevant market may be carried out by the Commission.

5. In accordance with the submissions of Lakshdeep, the Commission assessed only the Lakshdeep Share Transaction and observed that the same on standalone basis is not likely to give rise to any adverse competition concern in India and accordingly approved the same by passing an order under Section 31(1) of the Act dated 29.11.2012 ("**Order**"). As regards the submissions of Lakshdeep on the applicability of Item 8 of Schedule I of the Combinations Regulations on Steps III and IV, the Commission, while passing the Order, observed that as Lakshdeep would hold shares in Telewings to the extent of 51 percent, transfer of business from Uninor to Telewings and increase in stake of Telenor in Telewings from 49 percent to 74 percent cannot be considered as intra group transactions and therefore Item 8 of Schedule I to the Combination Regulations is not applicable to these steps.

6. Telewings filed an appeal with the erstwhile Hon'ble Competition Appellate Tribunal ("**CompAT**") questioning the observations made by the Commission in the Order on non-applicability of Item 8 of Schedule I to Steps III and IV of the Combination. CompAT noted the facts of the case and observed that the Commission rightfully sought

queries/clarifications regarding steps/transactions for which approval is sought. CompAT further observed that the Order has not been appealed by Lakshdeep and that Lakshdeep could not have raised the issue about Step III and IV which could have been raised only by Telewings separately and that the issue about Step III and IV was independent and separate from the issue of Step II though it was tried to be diabolically mixed up. CompAT also noted the specific replies given by Lakshdeep that they did not want any specific findings on Steps III and IV. Based on the aforesaid, as regards the Commission's observations on Step III and IV, CompAT observed that in view of the specific answers given to the queries, there was no necessity of making these observations and held that the same can be ignored for the present. CompAT clarified that this opinion should not be taken as an expression of opinion on merits of the observations and what is intended is to state that these observations (of the Commission) were premature. Further, CompAT noted that the Commission would be free to issue notice in the event these steps are undertaken by litigating companies.

7. On 20.03.2017, the Commission received a notice under Section 6(2) of the Act given by Bharti Airtel Limited and Telenor India for proposed transfer of 100 percent shares of Telenor India to Airtel through a court driven scheme of merger (Combination Regn. No. C-2017-04-494). During the review of the same, the Commission observed that Telenor has consummated the Telenor Share Transaction – Tranche 1[1] and subsequently increased its shareholding in Telenor India from 74 percent to 100 percent[2] ("**Telenor Share Transaction – Tranche 2**") without notifying the same to the Commission. It was also observed that Telenor India had also consummated Uninor Business Transaction[3] without notifying the same to the Commission.

8. The Commission observed that it had already held in the Order that the Telenor Share Transaction - Tranche 1 and the Uninor Business Transaction were not covered under Item 8 of Schedule I of the extant Combination Regulations. As regards Telenor Share Transaction - Tranche 2, the Commission observed that with 26 percent shareholding (left after Telenor

[1] Telenor Share Transaction – Tranche 1 was completed on 11.12.2013.
[2] Telenor Share Transaction – Tranche 2 was completed on 16.10.2014.
[3] Uninor Business Transaction was completed on 13.02.2015.

Share Transaction – Tranche 1), Lakshdeep still had joint control over Telenor India and therefore transfer of the same had the effect of changing control of Telenor India from joint control of Lakshdeep and Telenor to sole control of Telenor. In view of the same, Telenor Share Transaction Tranche 2 is also not an intra group transaction and therefore not covered under Item 8 of Schedule I of the Combination Regulations.

9. Based on the aforesaid, it appeared that the Uninor Business Transaction, the Telenor Share Transaction – Tranche 1 and the Telenor Share Transaction – Tranche 2 were notifiable and have been consummated without filing a notice with the Commission. Accordingly, separate show cause notices under Section 43A of the Act read with Regulation 48 of the Competition Commission of India (General) Regulations, 2009 ("**General Regulations**") were issued for failure to file notice under Section 6(2) of the Act, to Telenor for Telenor Share Transaction – Tranche 1 and Telenor Share Transaction – Tranche 2 and to Telenor India for Uninor Business Transaction. The show cause notices required Telenor and Telenor India 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 for failure to file notice for the aforesaid transactions in accordance with Section 6(2) of the Act.

10. Telenor sought to respond to the aforesaid show cause notices by way of a common response dated 10.01.2018 ("**Response**") after seeking extension. Along with the Response, Telenor requested for grant of personal hearing, in terms of Regulation 48 of the General Regulations.

11. In its meeting held on 09.05.2018, the Commission considered the Response and decided to grant an oral hearing to Telenor on 22.05.2018. However, *vide* letter dated 17.05.2018, Telenor requested for adjournment in the matter. The Commission accepted their request and granted a personal hearing on 03.07.2018. Accordingly, Telenor presented its case before the Commission on 03.07.2018.

B. Submissions of Telenor

12. In the Response and during personal hearing, Telenor, *inter alia*, contended the following:

Uninor Business Transaction and Telenor Share Transaction Tranche 1 were exempt under the Old Item 8 Exemption

12.1. That as on 29.11.2012 and until 04.04.2013 (when there was an amendment), Item 8 of Schedule I read with Regulation 4 of the Combination Regulations stated that:

"an acquisition of control or shares or voting rights or assets by one person or enterprise of another person or enterprise within the same group"

is ordinarily not likely to cause an appreciable adverse effect on competition and need not normally be notified with the Commission ("**Old Item 8 Exemption**").

12.2. That the only requirement under Old Item 8 Exemption was that the acquirer and target must be within the same "group" within the meaning of Explanation (b) to Section 5 of the Act. Under Explanation (b) to Section 5 of the Competition Act, the term 'group' refers to:

"two or more enterprises which are, directly or indirectly, in a position to:
(a) exercise 26% or more of the voting rights in the other enterprise4; or
(b) appoint more than 50% of the members of the board of directors in the other enterprise; or
(c) control the management or affairs of the other enterprise."

12.3. That on the date of execution of the SSHA, Telenor held majority shareholding of 67.25 percent shares in Uninor. […] Accordingly, at the time of execution of the SSHA, Uninor was a subsidiary of Telenor, solely controlled by Telenor and was part of the Telenor group and part of the same economic entity because it satisfied part (a) and (c) of the definition of "group".

[4] Vide Notification S.O. 481(E) dated 4 March 2011 and Notification S.O. 673(E) dated 04.03.2016, the Ministry of Corporate Affairs exempted " '*Group' exercising less than fifty per cent of voting rights in other enterprises from the provisions of Section 5 of the said [Competition] Act for a period of 5 years*".

12.4. That irrespective of Lakshdeep's shareholding, […] Telenor held 49 percent shares in Telewings coupled with rights and power to solely exercise decisive influence over the management and affairs and accordingly control over Telewings. The intention of the SSHA was that Telenor South Asia, at all times, would have sole control of Telewings and this is demonstrable based on the rights available to each Lakshdeep and Telenor South Asia. Accordingly, Telewings was part of the Telenor group and same economic entity because it fulfilled the requirement of part (c) of the definition of group.

12.5. That, accordingly, both the acquirer (Telewings) and the target enterprises (Uninor) in the Uninor Business Transaction and the acquirer (Telenor South Asia acting on behalf of Telenor) and the target enterprise (Telewings) were under the common control of Telenor and were part of the Telenor Group and therefore both the Uninor Business Transaction and Telenor Share Transaction – Tranche 1 were exempt from mandatory notification under Old Item 8 Exemption.

Lakshdeep had disclosed the entire four step inter-connected transaction to the Commission as part of the Combination

12.6. That as on 29.11.2012, Regulation 9(4) of the Combination Regulations stated that:

"where the ultimate intended effect of a business transaction is achieved by way of a series of steps or smaller individual transactions which are inter-connected [or inter-dependent on each other][5], one or more of which may amount to a combination[6], a single notice, covering all these transactions, [may be filed by the parties] to the combination".

[5] The words "*or inter-dependent on each other"* were omitted later by the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2016.
[6] The phrase "*may be filed by the parties*" was substituted by "*shall be filed by the parties*" by the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Amendment Regulations, 2015

12.7. That Section 6(2) of the Competition Act read with Regulation 9(4) of the Combination Regulations offered parties the flexibility to file a "single notice" notifying the various inter-connected or inter-dependent steps, (one or more of which may have comprised "combination") of a transaction, within 30 days of the binding document regarding the transaction. The Commission under Section 31(1) of the Competition Act was required to carry out a competitive assessment of all the constituent steps of a combination and thereafter approve or reject the combination in its entirety.

12.8. That Step I to Step IV reflected the ultimate intended effect and commercial objectives sought to be achieved by the Parties by agreeing to the terms of the SSHA. Since, at the time of execution of the SSHA, the Government of India's Foreign Direct Investment ("**FDI**") policy on "Telecom Services" permitted a foreign entity to hold up to 49 percent of the shares in an Indian telecom company, under the automatic route (i.e. without securing FIPB Approval), or up to 74 percent shares with the approval of the FIPB, it was envisaged that to start with Lakshdeep should invest in Telewings such that Telenor South Asia's shareholding in Telewings is eligible under the automatic approval route and the full intended 74:26 proportion should be achieved post receipt of FIPB Approval. In essence the combined effect of all the envisaged steps was to procure that ultimately Lakshdeep holds 26 percent shareholding in Telewings.

12.9. That in the instant case, the ultimate transaction sought to be achieved based on implementation of the stated steps was acquisition of 26 percent shareholding of Telewings by Lakshdeep, which was indeed achieved in accordance with the notified and disclosed SSHA. Any requirement to independently notify Steps III and IV when the two steps were clearly exempt under Old Item 8 Exemption would have been contrary to the letter and spirit of the Competition Act.

12.10. That Lakshdeep had disclosed the entire four step inter-connected transaction to the Commission as a part of the Combination. The Commission exercised jurisdiction over the Combination based on the attribution of the value of assets and turnover in Step III (i.e., by attributing the value of assets and turnover of Uninor to Telewings). Absent such attribution,

Step II would not have comprised a "combination" at all as the target enterprise in Step II was incorporated in February 2012 and did not had any unaudited or audited financial statements at the time of filing Notice making it eligible for de-minimis exemption. Accordingly, the Commission, by attributing the values of assets and turnover of Uninor to Telewings, acknowledged the inter-connected nature of the four steps comprising the Combination.

12.11. That Lakshdeep specifically requested the Commission to examine the competitive effects arising out of Step III and Step IV of the Combination, in case, it disagreed with Lakshdeep's submissions on Steps III and IV being exempt from the notification requirement.

12.12. That in light of the above, it is clear that, notwithstanding the Commission's observations at paragraph 8 of the Order (on Steps III and IV), it (a) could exercise jurisdiction over the Combination only because of Step III; and (b) expressly recognized that the Combination would ultimately result in Lakshdeep holding 26 percent shares in Telewings. Accordingly, the Commission's assertion in the Show Cause Notices that Steps III and IV of the Combination were not notified is incorrect.

Telenor Share Transaction – Tranche 2 was exempt under Item 2 and the Amended Item 8 of Schedule I to the Combination Regulations

12.13. That at the time of Telenor Share Transaction – Tranche 2, Item 8 of the Schedule I of the Combination Regulations had been amended to read as under ("**Amended Item 8**"),

"an acquisition of shares or voting rights or assets by one person or enterprise of another person or enterprise within the same group, except in cases where the acquired enterprise is jointly controlled by enterprises that are not part of the same group"

12.14. Item 2 of Schedule I of the Combination Regulations read as,

"*an acquisition of shares or voting rights, referred to in sub-clause (ii) or sub-clause (ii) of clause (a) of section 5 of the Act, where the acquirer, prior to acquisition, has fifty percent (50%) or more shares or voting rights in the enterprise whose shares or voting rights are being acquired, except in cases where the transaction results in transfer from joint to sole control"*

12.15. As stated above, based on the SSHA, Lakshdeep did not enjoy any contractually agreed affirmative voting rights conferring decisive influence and thus control over management and affairs of Telewings, and Telenor South Asia exercised sole control over Telewings. The position remained the same even after dilution of Lakshdeep's shareholding from the interim 51 percent to 26 percent and also when Telenor completed Telenor Share Transaction – Tranche 2. Accordingly, Telenor Share Transaction – Tranche 2 was exempt under Item 2 and Amended Item 8 exemption as there was never a change in control because Telenor always solely controlled Telewings.

Mitigating factors

12.16. In addition to the above, Telenor submitted that the Commission may consider, *inter alia*, following mitigating circumstances:

(i) That Telenor never sought to evade the Commission's jurisdiction and have made every effort to comply in a timely manner. The parties were entirely transparent with respect to all the steps of the Combination and that the Combination was approved by the Commission with full knowledge of Telenor Share Transaction – Tranche 1;

(ii) That there was no change in the competitive landscape as a result of the Uninor Business Transaction, Telenor Share Transaction – Tranche 1 and Telenor Share Transaction – Tranche 2.

C. **Analysis and Findings of the Commission**

13. Telenor has stated that Telewings and Uninor were in its sole control and accordingly Uninor Business Transaction and Telenor Share Transaction – Tranche 1 were intra group transactions covered under Old Item 8 Exemption. The submissions of Telenor in this regard are primarily based on its stated ability to exercise decisive influence and control over the management and affairs of Uninor and Telewings. To this effect, Telenor Respondents have made elaborate submissions on the their rights as regards management of Uninor and Telewings to emphasise that Telenor was always solely controlling these entities.

14. The Commission, *vide* its order dated 12.03.2018 passed under Section 44 of the Act in Ultratech Cement Limited C-2015-02-246, considered the aspect of control and inference of group and held that:

"12.8. As regards the issue of control over Century and Kesoram, the Acquirer has made reference to the three limbs of definition of 'group' as contained in explanation (b) to Section 5 of the Act. The Commission observes that the first test of the two enterprises belonging to the same group is the ability to exercise 50 percent or more voting rights; the second test is in terms of ability to control majority of composition of Board of Directors; and the third test, which is most dynamic, is in terms of ability to control or manage the affairs of the other enterprise.

12.9. The Acquirer has submitted that the Act does not intend to envisage control with shareholding less than 50 percent. In this regard, it is noted that the three limbs are 'either/or' tests and fulfilment of even a single limb would confer control. For example, if a particular enterprise does not hold 50 percent shares in the other enterprise, it may still have the ability to control if it has majority on the Board of Directors. Similarly, in the event, an enterprise does not have requisite shareholding nor the ability to control majority composition of the Board of Directors, it is possible to infer control by virtue of ability to control and manage the affairs of the other enterprise. The Commission observes that as pointed out by the Acquirer, ability to manage the affairs of the other enterprise may be

inferred from special rights/veto rights. However, special rights/veto rights are not the only basis for inferring the ability to manage/control the affairs of an enterprise and there can be other sources of control as well viz., status and expertise of an enterprise or person, Board representation, structural/financial arrangements etc. In competition law practice, control is considered as a matter of degree. However, all degrees and forms of control nonetheless constitute control. The international jurisprudence considers 'material influence' as the lowest form of control with other higher forms such as de facto control and controlling interest (de jure control) in that order.

12.10. Material influence, the lowest level of control, implies presence of factors which give an enterprise ability to influence affairs and management of the other enterprise including factors such as shareholding, special rights, status and expertise of an enterprise or person, Board representation, structural/financial arrangements etc. De facto control implies a situation where an enterprise holds less than majority of the voting rights, but in practice controls over more than half of the votes actually cast at a meeting. Further, the factors relevant for material influence are relevant for ascertaining de facto control as well. It may be noted that the concepts of material influence and de facto control are very significant in competition law as there can be situations where the commercial realities can be more telling than the formal agreements and structures. Controlling interest or de jure control means a shareholding conferring more than 50 percent of the voting rights of an enterprise. It may be noted that only one enterprise can have a controlling interest in the other enterprise but more than one enterprise can control the other enterprise (situation of joint control). ***Likewise, there are other terms which are used to express control such as negative control (by virtue of ability to block special resolutions)*** *or operational control (by virtue of commercial cooperation agreements with or without involving equity). Thus, while examining the third limb of the definition of group, regard needs to be given to the likelihood of the aforesaid degrees of control and not just the special rights as considered by the Acquirer."* (emphasis supplied)

15. In the instant case, the SSHA envisaged shareholding of Lakshdeep to be 51 percent which confers controlling interest to Lakshdeep. Telenor has submitted that Lakshdeep would have

brought down its shareholding to 49 percent in the event Telenor was not able to get the FIPB Approval and to 26 percent in case Telenor received the FIPB Approval. In both the situations, the minimum shareholding of Lakshdeep would have been 26 percent, which with or without any affirmative voting rights, confers the ability under the Companies Act to block special resolutions on Lakshdeep by virtue of its shareholding itself and exert negative control over the management and affairs of Telewings. Accordingly, the submissions of Telenor that it had ability to solely control the affairs of Telewings and Uninor are not considered as tenable.

16. It is also important to note that the instant case pertains to telecom sector and as stated by Telenor itself required compliance with the extant FDI policy. The FDI policy prescribes certain caps on shareholding of the foreign direct investor reflecting the level of control that a foreign direct investor is permitted to exercise. A discussion paper on FDI policy – Rationale and Relevance of Caps available on the website of DIPP[7] notes,

"The FDI equity caps in a sector essentially reflect the levels of control that a foreign direct Investor is permitted to exercise in a company operating within that sector. The FDI policy incorporates equity caps at broadly four levels- 26%, 49%, 51% and 74%. These caps reflect the ownership/ control levels in a company, under the Companies Act, 1956. Thus, for example, any equity holding greater than 25% gives a right to block a 'special resolution', 49% equity represents a level just short of ownership, 51% signifies ownership and a right to pass all ordinary resolutions. 74% equity cap on FDI means that the Indian equity holders, acting in unison, can block a special resolution".

17. Thus, negative control by virtue of more than 25 percent shareholding is considered as critical in context of FDI policy and meant to ensure that Indian equity shareholders, acting in unison, can block a special resolution. In this regard, it is noted that the submissions of Telenor regarding their ability to solely exercise decisive control over Telewings and Uninor are in fact contrary to the spirit of FDI policy norms also.

[7] Available on http://dipp nic.in/sites/default/files/DiscussionPaper_relevance_23June2011%20%205.pdf last accessed on 03.07.2018.

18. Thus, considering the fact that Lakshdeep's actual shareholding in terms of the Combination was 51 percent and was not envisaged to be less than 26 percent in any case, Telewings cannot be stated to be under sole control of Telenor at the time of Telenor Share Transaction – Tranche 1 or at the time of Telenor Share Transaction – Tranche 2. Similarly, in Uninor, though Telenor had majority shareholding, Uninor also cannot be stated to be under sole control of Telenor.

19. In view of the aforesaid negative control of Lakshdeep over Telewings and Unitech Group over Uninor, Uninor Business Transaction and Telenor Share Transaction – Tranche 1 cannot be considered as intra group acquisition of assets in terms of Old Item 8 Exemption.

20. Telenor has also pointed out that Old Item 8 Exemption only required the parties to belong to the same group while Amended Item 8 Exemption in addition requires that the transaction should not lead to change in control from joint to sole control. In this regard, it may be noted that the amendment was only meant to clarify what was already inherent in the exemption. The entire Schedule I contains instances of categories of combination which are not likely to result in any AAEC and does not contain any instance of change in control. Moreover, even if the Telenor's view on Old Item 8 Exemption and Amended Item 8 Exemption is accepted to conclude that change in control was not a necessary condition to allow exemption at the time of Uninor Busines Transaction and Telenor Share Transaction, it will not change the outcome considering in that event Telewings and Uninor India would also belong to Lakshdeep and Unitech groups respectively and these enterprises would not satisfy Old Item 8 Exemption, thus making the transactions notifiable.

On the aspect of applicability and coverage of Combination in terms of Regulation 9(4) of the Combination Regulations

21. The Commission had not disputed the fact that the four steps of Combination were inter-connected in terms of Regulation 9(4) of the Combination Regulations and the ultimate intended effect of the Combination was that Telwings will acquire assets of Unitech Wireless

and that Lakshdeep and Telenor will hold 26 percent and 74 percent of the share capital of Telewings. However, as in terms of Regulation 9(1) and Regulation 9(3) of the Combination Regulations respectively, in case of an acquisition or acquiring of control of enterprise(s), the acquirer is required to file the notice and in case of a merger or an amalgamation, parties to the combination are required to jointly file the notice, accordingly, for inter-connected transactions, all the acquirers/parties are required to jointly file the notice. In the instant case, Lakshdeep only had filed the notice as the "acquirer". As also noted by CompAT, Lakshdeep could not have raised the issue on Steps III and IV which could have been raised only by Telewings separately. In order to subject the entire transaction for assessment in terms of Regulation 9(4), the notice must have been filed by all the concerned parties together. Further, the parties to the Combination themselves made the statement on no requirement to notify Steps III and IV. It was in this backdrop that the Commission posed a specific query to the parties regarding the exact scope of notification, to which the parties responded by specific clarification that the scope of notification is the acquisition of 51 percent stake in Telewings by Lakshdeep (and the resultant transfer of telecom assets from Unitech Wireless to Telewings). It was further stated that the parties do not require the Commission's approval for Step III and Step IV as they believe that the same need not normally be filed. Though, it was added that if the Commission is of a different view, then an assessment of AAEC in the relevant market may be carried out by the Commission, the Commission could not have carried out the assessment in other market(s) considering the exact scope of notification defined by the parties.

22. In accordance with the submissions of the Acquirer, the Commission assessed and approved only the Step II as per which Lakshdeep and Telenor had 51 percent and 49 percent of the share capital of Telewings and also gave its opinion on Steps III and IV in the Order. Even the CompAT noted that the Commission was rightful in seeking the clarification as regards the steps for which approval was sought. The CompAT also noted that the issue of Steps III and IV was independent and separate from the issue of Step II though it was tried to be diabolically mixed up. Thus the fact that all the steps were disclosed does not absolve the parties of their obligations to file separate notice (if the transactions are not inter-connected)

or to file a composite notice jointly by the relevant parties (if the transactions are inter-connected) and at best can only be considered as a mitigating factor.

On the Telenor Share Transaction - Tranche 2

23. As stated above, Telewings continued to be in joint control of Telenor and Lakshdeep with Lakshdeep holding 26 percent shares at that time and thus being in a position to block special resolutions and thus exercising negative control over the affairs of Telewings. Thus, Telenor Share Transaction – Tranche 2 leading to Telenor acquiring 100 percent shares in Telewings consequently implied change in control from existing joint control of Telenor and Lakshdeep to sole control of Telenor. Accordingly, the submissions of Telenor that Telenor Share Transaction – Tranche 2 was exempt under Item 2 and Amended Item 8 exemption as there was never a change in control because Telenor always solely controlled Telewings are not considered as tenable.

24. Based on the aforesaid, the Commission is of the opinion that the Uninor Business Transaction, Telenor Share Transaction – Tranche 1 and Telenor Share Transaction – Tranche 2 were notifiable and Telenor and Telenor India have consummated these transactions without filing a notice under Section 6(2) of the Act and accordingly attract penalty under Section 43A of the Act, which 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."

25. In terms of Section 43A of the Act, the Commission can levy a maximum penalty of one per cent of the combined value of the worldwide turnover of the parties. However, the Commission has sufficient discretion to consider the conduct of the parties and the circumstances of the case to arrive at the appropriate amount of penalty. The Commission noted that the facts that Telenor had disclosed Telenor Share Transaction – Tranche 1 and

Uninor Business Transaction in the Notice and that the Commission had also exercised jurisdiction over the Combination by attributing the value of assets and turnover of Uninor and observed that these may be considered as mitigating factors. However, there do not appear to be any mitigating factors in so far as it relates to consummation of Telenor Share Transaction – Tranche 2 without filing a notice with the Commission under Section 6(2) of the Act. In view of the foregoing, the Commission considers it appropriate to impose a nominal penalty of INR 5,00,000/- (INR Five Lakhs only) on Telenor.

26. Telenor shall pay the penalty within sixty (60) days from the date of receipt of this order.

27. The Secretary is directed to communicate to Telenor accordingly.