COMPETITION COMMISSION OF INDIA

17th December 2021

Proceedings against Investcorp India Asset Managers Private Limited under Section 43A of the Competition Act, 2002

CORAM:

Mr. Ashok Kumar Gupta
Chairperson

Ms. Sangeeta Verma
Member

Mr. Bhagwant Singh Bishnoi
Member

Appearances during the hearing

For Investcorp India Asset Managers Private Limited	**:**	Mr. Rajshekhar Rao, Senior Advocate with Mr. Gaurav Desai, Ms. Mansi Sood, Mr. Ruchir Sinha and Ms. Shruti Bhat, Advocates alongwith Ms. Anjana Sinha, representative of Investcorp India

ORDER UNDER SECTIONS 43A OF THE COMPETITION ACT, 2002

This Order shall dispose of the proceedings under Section 43A of the Competition Act, 2002 (**Act**) against Investcorp India Asset Managers Private Limited (**Investcorp India**) in relation to its acquisition of the private equity and real estate investment management businesses of IDFC Alternatives Limited (**IDFC Alternatives**).

Impugned Transaction and the parties

2. The Impugned Transaction comprised the acquisition of real estate fund management and private equity fund management businesses of IDFC Alternatives by Investcorp India on a slump sale basis for a lump sum consideration. The binding documents regarding the Impugned Transaction were entered into between 26th July 2018 and 30th January 2019, and the transaction was consummated on 1st

February 2019. The details of the fund which are part of the Impugned Transactions are as under:

2.1. *Investcorp Infrastructure Fund 1*[1]: A fund registered as a venture capital fund under the Securities and Exchange Board of India (Venture Capital Funds) Regulations, 1996;

2.2. *Investcorp Private Equity Fund II*[2]: A fund registered as an alternative investment fund under the Securities and Exchange Board of India (Alternative Investment Fund) Regulations, 2012 (**AIF Regulations**);

2.3. *Investcorp Real Estate Yield Fund*[3]: A fund registered as an alternative investment fund under the AIF Regulations; and

2.4. *Investcorp SCORE Fund*[4]: A fund registered as an alternative investment fund under the AIF Regulations.

3. IDFC Alternatives was engaged in investment management. It offered portfolio and risk management, investment banking and advisory services.

4. The primary business activities of Investcorp India were the provision of investment management services and management, operation and supervision of the investment vehicles including but not limited to the alternate investment funds, venture capital funds, *etc*.

Initiation of proceedings under Sections 20(1) and/or 43A of the Act

5. The Commission, in its meeting held on 14th January 2020, decided to inquire into the Impugned Transaction to assess whether further proceeding is required under Section 20(1) and/or Section 43A, as the case may be. In pursuance thereof, a letter dated 17th January 2020 was sent to Investcorp India requiring it to furnish

[1]Formally known as IDFC Infrastructure Fund 3
[2]Formally known as IDFC Private Equity Fund IV
[3]Formally known as IDFC Real Estate Yield Fund
[4]Formally known as IDFC Score Fund

necessary details about the Impugned Transaction. In response, Investcorp India filed its submission on 25th February 2020. Upon perusing the response of Investcorp India, it was considered necessary to obtain further information from it. Accordingly, another letter dated 30th September 2020 was issued to Investcorp India requiring it to furnish additional information. In response, Investcorp India filed its submission dated 21st October 2020.

6. The Commission, in its meeting held on 27th November 2020, was *prima facie* satisfied that Investcorp India ought to have given a notice under Section 6(2) of the Act regarding the Impugned Transaction. However, it did not give any notice to the Commission. Therefore, the Commission decided to issue a notice under Sections 20(1) and 43A of the Act read with Regulation 48 of the Competition Commission of India (General) Regulations, 2009 to Investcorp India to show cause as to why penalty in terms of the said provision of the Act shall not be imposed on Investcorp India and why it shall not be required to given notice in respect of the Impugned Transaction, in terms of Regulation 8 of the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (**Combination Regulations**). Accordingly, a notice dated 21st December 2020 was issued to Investcorp India (**SCN**). The SCN observed as under:

> ...
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> *5. As regards the notifiability of the impugned transactions, Investcorp India has submitted that the investments made by Investcorp Infrastructure Fund 1 were made under the VCF Regulations and were exempt from the requirement of obtaining an approval of the Commission under Section 6(4) of the Act. Therefore, when Investcorp India acquired the fund management business of Investcorp Infrastructure Fund 1 from IDFC Alternatives, it [i.e. Investcorp India] believes that such change of investment manager of the VCF Funds should also be eligible for the same exemption as Investcorp Infrastructure Fund 1 continues to retain its status as a venture capital fund governed by VCF Regulations. It has been further submitted that the value of assets or turnover of all of the portfolio entities of Investcorp Private Equity Fund II fall below the thresholds prescribed under notification S.O. 988(E) dated 27th March, 2017 (de minimis exemption).*

6. At the outset, the impugned transactions are a group of inter-connected steps constituting one composite combination and thus, a particular step cannot be seen in isolation for the purpose of any exemption including de minimis. This position has also been clarified by the Hon'ble Supreme Court in CCI v. Thomas Cook & Anr. (2018).

7. As regard the argument on applicability of Section 6(4) to acquisition of Investcorp Infrastructure Fund 1, it is observed that Section 6(2) requires Parties to combination to give notice to the Commission in respect of their Proposed Combination. However, Section 6(4) of the Act provides that ... provisions of this section shall not apply to share subscription or financing facility or any acquisition, ***by a public financial institution, foreign institutional investor, bank or venture capital fund, pursuant to any covenant of a loan agreement or investment agreement*** *[emphasis added]. In the instant matter, the impugned acquisitions are not a case of acquisition by a venture capital fund but contemplate acquisition of a venture capital fund.*

8. As regards the applicability of de minimis exemption only to rest of the Acquired Funds, it is observed that when the other part of the transaction is a notifiable combination, these inter-connected steps shall also be notified to the Commission in terms of Section 5 of the Act read with regulations 9(4) and 9(5) of the Combination Regulations.

9. In view of the above, the Commission is of the prima facie view that the impugned acquisitions are combination(s) not covered under Section 6(4) of the Act and notification of the same is not dispensed by any exemption. Thus, Investcorp India ought to have given notice to the Commission in terms of Section 6(2) of the Act read with Regulation 5 of the Combination Regulations. However, Investcorp India failed to comply with such requirement...

7. Investcorp India submitted its reply dated 1st February 2021 to the SCN along with a request for personal hearing in the matter (**Reply**). The Commission acceded to the request and heard Investcorp India at length on 8th September 2021. The Commission further allowed Investcorp India to file written submissions, which were filed on 24th September 2021.

Issues for determination

8. The Commission has considered the written and oral submissions of Investcorp India. The primary contention of Investcorp India is that the value of assets and turnover of portfolio entities of funds whose management were acquired by

Investcorp India pursuant to the Impugned Transaction cannot be considered for the purpose of testing the financial threshold under Section 5 of the Act as well as the *de minimis* exemption[5]. The contentions and arguments of Investcorp India could be broadly summarised as under:

8.1. There has been no acquisition of control over the investee/portfolio companies of the venture capital fund (**VCF**) and the alternative investment funds (**AIFs**), which were only managed by IDFC alternatives;

8.2. The Impugned Transaction benefits from *de minimis* exemption;

8.3. Indian Accounting Standard 110 does not require an investment manager to consolidate the financials of investee/portfolio companies of funds managed by an investment manager; and

8.4. Only a share in the financials of the underlying investee/portfolio companies proportionate to the shareholding and control of the Acquirer should be considered for the purpose of Section 5 of the Act. In such a case, the aggregate of such turnover is within the prescribed limit for *de minimis* exemption.

9. The determinations of the Commission in relation to the above are as under:

(i) Acquisition of control over portfolio entities

10. Investcorp India has argued that the Trustee has legal and beneficial ownership over the assets of the funds, and the beneficial interest in these assets lies with the unitholders. The assets of the funds are separate from the assets of the investment manager. The investment manager does not enjoy ownership or controlling rights over the assets of any of the funds. Decisions taken by the investment manager in the discharge of their functions are for the funds and their unitholders, and not for itself. Thus, it would not be appropriate to consider as if the portfolio entities of the concerned funds are owned by Investcorp India.

[5] Exemption *vide* Notification No. S.O. 989(E) dated 27th March 2017 issued by Ministry of Corporate Affairs, Government of India

11. In this regard, the Commission notes that, pursuant to the Impugned Transaction, Investcorp India has acquired the real estate and private equity fund management businesses of IDFC Alternatives. Resultantly, Investcorp India has become the manager of the concerned VCF and AIFs. While the terms of subscription may vary in different pooled investment schemes, generally, these investment structures envisage demutualisation of investment management and ownership, wherein subscribers give authority to the investment managers to conduct the operations of the fund. Under this demutualised mechanism, the investment manager enjoys control over the management of the fund. Though the beneficial ownership of these categories of funds lies with unitholders, the control over the operations and management of the fund is entrusted to the investment manager.

12. Funds have varying degrees of interest, such as sole control, joint control, mere financial interest, *etc.* in their portfolio entities. The degree of interest would depend on the shareholding and contractual rights of the fund with respect to the given portfolio entity. The investment manager of the fund, being the authority to exercise and protect such interest, would invariably enjoy control over the portfolio entity where the shareholding and/or contractual rights of the fund is such as to enable material influence or higher degree of control over the given portfolio entity. Needless to say, when the fund management business of such a fund is acquired, the acquirer would also gain control over such portfolio entities of the fund. The Commission notes that acquisition of control is one of the forms of combination under Section 5 of the Act, and accordingly, the acquirer needs to give notice in terms of Section 6(2) of the Act read with the relevant provisions of the Combination Regulations. The said requirement of law is not dispensed with only on account of the beneficial interest being vested in person(s) other than the acquirer.

13. It has been argued that, in similar earlier cases notified to the Commission, the asset management company along with the concerned trustee were acquired. The trustee being the legal owner of the assets of the fund, it was appropriate to take

into consideration the financials of the portfolio companies. However, in the instant matter, Investcorp India has only acquired investment management business and therefore, it cannot be said to have acquired the portfolio entities of the target fund in the absence of the acquisition of the trustee. In this regard, the Commission notes that, while the structure of an acquisition may vary from transaction to transaction, the requirement of notification does not presuppose the combined acquisition of both the investment management and trustee of the fund. As long as the investment manager is responsible for decision making relating to the operational management of the fund, it would enjoy control over the fund. This factual aspect would be the same, irrespective of whether the trustee is being acquired as part of the combination. Accordingly, a notice under Section 6(2) of the Act would have to be given as long as control over the operations of a fund is acquired. Therefore, it cannot be said that the said earlier transactions were notified only on the basis suggested by the Acquirer.

14. Investcorp India has submitted that its role as an investment manager is subject to the overall supervision, control and direction of the Trustee. Further, the services of the investment manager can be terminated by the Trustee. In this regard, the Commission observes that the investment manager enjoys operational control over the fund, although the overall supervision of certain aspects may lie with the trustee. As per the details provided in the Reply, the investment manager may be terminated by ********** ********** ********** ********** ********** ********. The Commission observes that mere ability and/or possibility of the trustee to terminate the investment manager, that too only after obtaining specified approval from unitholders, does not negate the fact of operational control of the Acquirer over the operations of the target business. It may be the case that the subscription of the given fund is subject to the joint control, *de facto or de jure*, of the investment manager, trustee and/or the unitholder. However, mere existence of

joint control of the trustee or the unitholder is not a factor to conclude that the investment manager does not have control of the fund.

(ii) de minimis exemption

15. As a corollary of the above contention including that Investcorp India does not enjoy ownership over the assets of the funds managed by IDFC Alternatives and acquired by it, Investcorp India has argued that the value of assets and turnover of the target investment management business of IDFC Alternatives alone is relevant for the purpose of *de minimis* exemption. The value of asset and turnover of the acquired fund management business (disregarding the financials of the portfolio entities) are lower than the *de minimis* threshold.

16. One may claim that the Impugned Transaction is eligible for *de minimis* exemption. Such contention may look appropriate only when the financials of the acquired fund management business alone is taken into consideration. However, as noted earlier, pooled investment schemes generally envisage demutualisation of investment management and ownership, wherein the subscribers give authority to the investment managers to conduct the operations of the fund. Accordingly, in case of the acquisition of any investment management businesses, the value of assets and turnover of the controlled portfolio entities would also be relevant for the purpose of computing threshold under Section 5 of the Act as well as the *de minimis* threshold. In the instant matter, only two portfolio entities of the Acquirer *i.e.* GMR Energy Limited and Star Agri warehousing and Collateral Management Limited are sufficient to meet the threshold under Section 5 of the Act and breach the *de minimis* exemption threshold.

(iii) Accounting standard 110

17. Investcorp India has claimed that Indian Accounting Standard 110 does not require an investment manager to consolidate the financials of the investee/portfolio companies of the funds managed by it. The Commission notes that such position of

the Accounting Standards is not relevant for the purpose of testing the thresholds prescribed under Section 5 of the Act. In this regard, the Commission notes that, in a fund management arrangement, where the ultimate beneficiaries have given authority to the investment manager to enjoy control over management of the fund, the assets and turnover of the fund would be attributable to the financials of the investment manager for the purpose of Section 5 of the Act as well the *de minimis* exemption.

(iv) At best, only a proportionate share in the financials of the underlying investee/portfolio companies to be considered

18. Lastly, the Acquirer has contended that even if assets and turnover of the investee companies are taken into consideration, they should be considered only on a proportionate basis, *i.e.* to the extent of shareholding and control over the give target entity. In such a case, the aggregate of such turnover is within the prescribed limit specified for *de minimis* exemption. In this regard, the Commission observes that Section 5 does not operate on the basis of proportionality contended by the Acquirer. Even if an enterprise acquires material influence (which is the starting threshold of control) over another entity, the whole of the financials of the target enterprise would be taken into consideration for the purpose of Section 5 of the Act. Thus, if control is established, the complete financials of the fund/target would be attributed to the fund manager for the purpose of Section 5 of the Act.

19. In view of the above, the Commission concludes that the acquisition of real estate fund management and private equity fund management businesses of IDFC Alternatives by Investcorp India was a combination in terms of Section 5 of the Act and *de minimis* exemption was not available in relation to the same. Accordingly, Investcorp India, being acquirers, failed to give notice to the Commission in terms of Section 6(2) of the Act.

20. In terms of Section 43A of the Act, if any person or enterprise fails to give notice under Section 6(2) of the Act, 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. Though the penalty under Section 43A of the Act can be to the said extent mentioned therein, the Commission has sufficient discretion to consider the conduct of the parties and circumstances of the case to arrive at an appropriate amount of penalty.

21. In the instant case, Investcorp India has extended cooperation in the inquiry and supplied requisite material/documents in response to the information requirement of the Commission. Such material/documents formed the basis of the above findings of contravention. Keeping these in mind, the Commission considers it appropriate to impose a penalty of INR Twenty Lakh on Investcorp India. Investcorp India shall pay the penalty within 60 days from the date of receipt of this order.

22. The Secretary is directed to inform Investcorp India, accordingly.