

COMPETITION COMMISSION OF INDIA

3rd January, 2013

Combination Registration No. C-2012/11/92

Order under section 43A of the Competition Act, 2002

1. On 19th November, 2012, the Competition Commission of India (hereinafter referred to as the "Commission") received a notice under sub-section (2) of Section 6 of the Competition Act, 2002 (hereinafter referred to as the "Act") of the proposed combination between Dewan Housing Finance Corporation Limited (hereinafter referred to as "DHFL"), First Blue Home Finance Limited (hereinafter referred to as "First Blue") and DHFL Holdings Private Limited (hereinafter referred to as "DHPL") (hereinafter DHFL, First Blue and DHPL shall collectively be referred to as the "parties to the combination").
2. The proposed combination relates to the merger of First Blue and DHPL with DHFL pursuant to a scheme of amalgamation under the provisions of Sections 391 to 394 of the Companies Act, 1956 (hereinafter referred to as the "Scheme"). The Board of Directors of each of the parties to the combination approved the Scheme, through separate resolutions passed on 28th September, 2011. Along with the notice, the parties to the combination also submitted an application for condonation of delay as the notice was given to the Commission beyond the time period specified in sub-section (2) of Section 6 of the Act. The Commission considered the application for condonation of delay, in its meeting held on 29th November, 2012 and admitted the belated filing in terms of Regulation 7 of the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 without prejudice to the action that may be taken under Section 43A of the Act.
3. The Commission in the said meeting *inter-alia* decided to initiate a separate proceeding regarding imposition of penalty under Section 43A of the Act as the notice was not given within the time specified in sub-section (2) of Section 6 of the Act and accordingly, a show cause notice dated 6th December, 2012 in terms of Section 43A of the Act read with Regulation 48 of the Competition Commission of India (General) Regulations, 2009 was issued to each of the parties to the combination.
4. On 12th December, 2012, the Commission received the reply of the parties to the combination to the show cause notice wherein it was *inter-alia* submitted that:

"..... Re: Cause of delay:



The Applicants have filed the present Form I in accordance with section 6(2) of the Act for seeking approval of the proposed merger of First Blue Home finance Limited ("First Blue") and DHFL Holdings Private Limited ("DHFL Holdings") with Dewan Housing Finance Corporation Limited ("DHFL"). As explained in the Application for condonation of delay, this set of transactions is being undertaken in compliance with the directions of the sectoral regulator, the National Housing Bank (NHB).

Pursuant to the notification of Section 5 of the Act in June 2011, the Applicants sought legal advice on whether any approval is to be obtained from this Hon'ble Commission for the proposed intra-group mergers being undertaken in compliance with the directions of the sector regulator, NHB. DHFL was advised that no filing is to be made to the Hon'ble Commission. DHFL, fully believing in the legal advice rendered, did not notify the Hon'ble Commission seeking approval for the proposed Combination.

Thereafter, on 27.07.2012 DHFL received approval for the Scheme of Amalgamation of First Blue and DHFL Holdings with DHFL from the Hon'ble High Court of Bombay. The matter is listed before the Hon'ble High Court of Delhi on 04.01.2013 for hearing of the petition filed by First Blue on the said Scheme of Amalgamation.

It is submitted that only recently, during discussions between the Applicants and the Official Liquidator, appointed by the Hon'ble High Court of Delhi, who is overseeing the proposed Combination, the issue of seeking approval from this Hon'ble Commission again came up. As a matter of abundant precaution, the Applicants took a second legal opinion vis-a-vis the requirement of filing a notice with this Hon'ble Commission for the proposed Combination in terms of section 6(2) of the Act. Accordingly, the Applicants have now filed the present Form I seeking approval of this Hon'ble Commission to the proposed Combination undertaken in compliance with the directions of the sectoral regulator, NHB.

It may be pointed out that the Applicant bonafidely relied on legal advice and had no intentions to avoid seeking prior approval of CCI.

..... Re: Reasonability of the cause:

It is submitted that this is a fit case of leniency for the following reasons:

(a) Delay was caused by bona fide mistake

It is submitted that the delay in filing was caused by a bona fide mistake which has been held by the Hon'ble Supreme Court in a catena of cases that leniency should



be shown in case of bonafide mistake. For instance , in the case of M/S Hindustan Steel Ltd. V. State of Orissa reported as (1969) 2 SCC 627, Hon'ble Supreme Court held that penalty will not ordinarily be imposed unless the party either acted deliberately in defiance of law or was guilty of dishonest conduct. The relevant extract

In light of the aforesaid it is submitted that the delay in filing was caused by a bona fide mistake and hence this is a fit case for not levying a penalty. Further, this Hon'ble Commission may bear in mind that DHFL has already paid Rs. 9.50 lakh over and above what they would have paid had the notice under section 6(2) been filed in time. Clearly, DHFL has already suffered a huge monetary loss.

(b) Incorrect legal advice is a valid defence

It is submitted that the Applicant made a bona fide mistake because of incorrect legal advice. Hon'ble Supreme Court in a catena of cases has held that incorrect legal advice is a valid defence and should be considered by the courts... ..

In light of the aforesaid discussion it is submitted that this is a fit case for leniency as the delay is due to bona fide mistake caused by incorrect legal advice. Consequently, it is most humbly prayed that leniency be shown to the Applicants and no penalty be imposed in terms of section 43A of the Act."

5. The Commission considered the reply to the said show cause notice given by the parties to the combination in its meeting held on 18th December, 2012 and directed the parties to the combination to appear before the Commission on 3rd January, 2013 to present their case as to why penalty in terms of Section 43A of the Act should not be imposed upon them. The Commission heard the legal representatives of the parties to the combination in its meeting held on 3rd January, 2013.
6. In the instant case, the Board of Directors of each of the parties to the combination i.e. DHFL, First Blue and DHPL approved the Scheme by their respective resolutions passed on 28th September, 2011. In such case, in terms of sub-section (2) of Section 6 of the Act, the parties to the combination ought to have given notice to the Commission within thirty days of the approval of the Scheme by the Board of Directors of the parties to the combination. However, the notice was filed on 19th November, 2012 with a delay of around 388 days. Therefore, the parties to the combination failed to give notice to the Commission in accordance with sub-section (2) of Section 6 of the Act.
7. It has been submitted by the parties to the combination that they did not give notice to the Commission under sub-section (2) of Section 6 of the Act as they relied on the legal advice that no filing was required to be made to the Commission.



merger or amalgamation between a parent company and its subsidiary as they would together constitute one and single enterprise only. Copies of the legal advice/opinion dated 20th October, 2011 mentioned above, which was relied upon by the parties to the combination, were provided to the Commission during the course of hearing on 3rd January, 2013.

8. It is observed that the Commission in its order dated 28th December, 2011, in the notice bearing Comb. Reg. No. C-2011/12/12, clarified that the notice under sub-section (2) of Section 6 of the Act shall be given to the Commission even in cases of merger or amalgamation between a parent company and its subsidiary. Thereafter, the Commission received several belated notices in respect of mergers and amalgamations between parent and subsidiary companies. In all such cases, notices were issued to the parties to the respective combination to show cause why penalty should not be imposed upon them under Section 43A of the Act for not having given the notice within the time period specified in sub-section (2) of Section 6 of the Act. After considering the submissions of the respective parties in all these cases, it was *inter alia* decided by the Commission not to impose penalty since it was only the first year of implementation/enforcement of the provisions of the Act relating to regulation of combinations during the course of which the respective belated notice(s) were given to the Commission.
9. In the instant case, the parties to the combination have submitted that they acted upon an incorrect legal advice dated 20th October, 2011 and the delay in giving the notice was caused by a *bona fide* mistake. While delay on account of incorrect legal advice may be regarded as a mitigating factor in levying penalty, considering the inordinate delay on the part of the parties to the combination in giving notice even after the clarification/decision of the Commission cited above, and the subsequent belated filings and the respective penalty proceedings decided by the Commission, the submission of the parties to the combination for not levying any penalty is not agreed to.
10. As per the details provided in the notice, the value of assets and turnover of the parties to the Combination for the financial year ending 31st March, 2011 are as follows:

Value in INR crore

Enterprise	Assets	Turnover
DHFL	16681.59	1451.24
First Blue	5576.66	578.36
DHPL	738.57	0.40
Total	22996.82	2030

11. In terms of Section 43A of the Act, if any person or enterprise fails to give notice under sub-section (2) of Section 6 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 assets.



whichever is higher, of such a combination. Considering the facts and circumstances of the case including the submission of parties to the combination that they acted upon an incorrect legal advice and have given the notice to the Commission pursuant to their discussion with the Official Liquidator, appointed by the Hon'ble High Court of Delhi, the Commission considers it appropriate to impose a relatively nominal penalty on the parties to the combination. Therefore, in exercise of the powers under Section 43A of the Act, a penalty of INR 5,00,000/- (Rupees Five lakhs) is imposed on the parties to the combination. The parties to the combination shall pay the penalty within 60 days from the date of receipt of this order.

12. The Secretary is directed to communicate to the parties to the combination accordingly.



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11/1/13