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Fair Competition
For Greater Good

COMPETITION COMMISSION OF INDIA

(Combination Registration No.C-2015/07/289)

14.07.2016

Order under Section 43A of the Competition Act, 2002 ("Act") in relation to combination registration no. C-2015/07/289

Introduction

1. The Competition Commission of India ("**Commission**"), in its meeting held on 30.03.2015, observed that Eli Lilly and Company ("**Eli Lilly**" / "**Acquirer**") entered into a Stock and Asset Purchase Agreement ("**SAPA**") with Novartis AG ("**Novartis**") on 22.04.2014 to acquire the global veterinary pharmaceuticals business of the latter i.e. Novartis Animal Health (**"NAH"**). However, the said acquisition was not notified to the Commission as required under sub-section (2) of Section 6 of the Act. Accordingly, a communication dated 08.04.2015 was issued to Eli Lilly under sub-section (1) of Section 20 of the Act, seeking information relating to the aforesaid acquisition. The response of Eli Lilly was received on 07.05.2015.

2. On 09.07.2015, the Commission received a notice in Form II given by Eli Lilly in relation to the said acquisition of NAH from Novartis. As per the information given in the Notice, the global acquisition of NAH by Eli Lilly was consummated on 01.01.2015. In relation to India, Novartis India Limited ("**Novartis India**" a subsidiary of Novartis) and Elanco India Private Limited ("**Elanco India**", a wholly owned subsidiary of Eli Lilly) entered into a Slump Sale Agreement ("**SSA**") on 03.12.2014, for the transfer of assets of Novartis India, relating to NAH business, to Elanco India ("**India Leg**").

3. The Commission, in its meeting held on 14.07.2015, noted the response submitted by Eli Lilly on 07.05.2015 and based on the facts on record observed that Eli Lilly and Novartis satisfied the jurisdictional asset/turnover thresholds under the Act and that Eli Lilly's acquisition of NAH business amounts to a combination in terms of Section 5 of the Act. The said acquisition ought to have been notified to the Commission in terms of sub-section (2) of Section 6 of the Act, within the prescribed timelines. However, since Eli Lilly had already filed the notice for the combination in Form II, the Commission decided not to issue a

direction under sub-regulation (2) of Regulation 8 of the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 ("**Combination Regulations**"). The said decision was taken without prejudice to any penalty which may be imposed or any prosecution which may be initiated against the Acquirer in accordance with the provision of the Act.

4. The Commission, in its meeting held on 03.12.2015, considered the combination and approved the same under sub-section (1) of Section 31 of the Act.

Proceedings under Section 43A of the Act

5. As already stated, the acquisition of NAH business by Eli Lilly was a combination in terms of Section 5 of the Act and ought to have been notified to the Commission in accordance with sub-section (2) of Section 6 of the Act. It was also noted from the submissions of the Acquirer that the combination was already closed in all jurisdictions except India, where the closing of the transaction was deferred[1].

6. In view of the foregoing, it *prima facie* appeared that the Acquirer not only failed to give the notice of the combination with in the time stipulated under sub-section (2) of Section 6 but also effected the same before giving notice to the Commission, in contravention of sub-section (2) read with sub-section (2A) of Section 6 of the Act. Accordingly, in its meeting held on 03.12.2015, the Commission, decided to initiate proceedings under Section 43A of the Act. Accordingly, a show cause notice was issued to Eli Lilly under Section 43A of the Act read with Regulation 48 of the Competition Commission of India (General) Regulations, 2009("**General Regulations**"), to explain, in writing, within 15 days of the receipt of such communication as to why penalty, in terms of Section 43A of the Act, should not be imposed on Eli Lilly for failure to file a notice in respect of the combination under sub-section (2) of

[1] As per Clause 6.1 of the SSA, closing of India-leg of the combination was conditional on Elanco India obtaining approval from Foreign Investment Promotion Board (FIPB). On 08.07.2015 (i.e. one day before filing the notice with the Commission), Novartis India and Elanco India executed First Amendment to Slump Sale Agreement wherein, in addition to the FIPB approval, the closing of the transaction in India was made conditional upon Elanco India obtaining written approval from the Commission to consummate such acquisition (or, in the alternative, confirmation from the Commission that it does not have jurisdiction to review such transaction).

Section 6 of the Act ("**SCN**"). Eli Lilly filed its response to the SCN with the Commission on 29.12.2015("**Response to SCN**").

7. The Commission, in its meeting held on 29.03.2016, considered the Response to SCN and decided to grant a personal hearing to Eli Lilly, as requested. The authorized representative of Eli Lilly was heard on 21.04.2016. The Commission noted that *vide* its written and oral submissions, Eli Lilly made, *inter alia*, following submissions:

7.1 That the transaction was exempted from the Act by virtue of the Notification No. SO 482 (E) dated 4 March 2011, as amended by the Corrigendum No. SO 1218 (E) dated 27 May 2011 ("**De Minimis Exemption**"), which exempts acquisitions of a target enterprise with sales or assets in India below INR 750 crores and INR 250 crores respectively. In the instant case, the sales and assets of the target business, being NAH, had turnover and assets in India below the asset and turnover thresholds provided in the De Minimis Exemption. In support of the above contention, Eli Lilly has submitted that the statute expressly defines "*enterprise*" very broadly to focus on its "*activities*" rather than form. Further, the expansive definition of "*person*" and thus "*enterprise*" expressly includes both incorporated and unincorporated entities. What matters is that the enterprise is "*engaged in any activity relating to*" production, sales, marketing and other activities potentially affecting competition.

7.2 That the Supreme Court in *M/S. Waterfall Estates v. The Commissioner of Income-Tax (AIR 1996 SC 3183)* has held that a company's various lines of businesses could be taxed as independent persons because they each were identifiable businesses of the company. They were separate assessees (i.e., separate "*persons*") for tax purposes because they represented "distinct businesses". Similar is the case with NAH and therefore, NAH is an "*enterprise*" for purposes of the De Minimis Exemption and its sales and assets easily qualified for that exemption.

7.3 That even if one were to apply the De Minimis Exemption only at an "*enterprise*" level or to an "*incorporated selling company*", Novartis India (being the incorporated entity in India selling the target business in India) would also qualify for the De Minimis Exemption. The turnover of Novartis India was below the value of turnover prescribed in the De Minimis Exemption after excluding sales from over the counter business which

was transferred to GlaxoSmithKline in a separate combination approved by the Commission on 12.12.2014.

7.4 That under the circumstances, a filing could only potentially have been required if the thresholds contained in the De Minimis Exemption are applied to the ultimate parent, Novartis and not to Novartis India or NAH.

7.5 That Indian law should be consistent with merger control regimes in the rest of world which follow International Competition Network ("**ICN**") Recommended Practices for Merger Notification Procedures which *inter-alia* provides that the 'local nexus' thresholds should be confined to the relevant entities or businesses that will be combined in the proposed transaction. The Acquirer has also submitted that the Commission has neither issued a set of regulations interpreting its filing thresholds nor does the Commission has any informal guidance on its website on the manner in which the Commission calculates the value of assets and turnover for purposes of the jurisdictional thresholds of Section 5 of the Act.

7.6 That Eli Lilly did not close the India Leg prior to receiving the Commission's unconditional clearance as the closing of the combination was deferred in India. There is no evidence that closing the SAPA outside India had any effect on competition in India. On the contrary, the businesses were operated entirely separately, with separate personnel, marketing, pricing and operations in India. Eli Lilly declined to transfer the business until receiving the approval of the Commission.

7.7 That the sale of NAH in India was effectuated by a separate binding agreement between the subsidiaries of Eli Lilly and Novartis. Thus, the binding agreement for the purposes of the combination is the SSA dated 03.12.2014, and not the SAPA dated 22.04.2014. It has been submitted that the Board of Novartis India did not adopt the resolution approving the transfer of NAH until 10.11.2014 and then the parties entered into the separate Indian SSA, which expressly governed the sale of NAH. In support of the above, the Acquirer has submitted that SAPA does not impose a binding obligation to transfer the India business as it does not transfer title to any shares or assets to the NAH business in India.

7.8 That a fine would be unwarranted in this case because any failure to notify the Commission was based upon an honest and reasonable legal belief concerning the applicable exemption. Any such failure also could not have caused any harm to Indian markets and/or consumers and was rectified when brought to the parties' attention.

8. During the oral hearing, the authorised representatives of the Acquirer made following additional submissions:

8.1 That the parties did not try to conceal the arrangement, whether in India or elsewhere. The Acquirer has referred the judgement of COMPAT in Appeal No.48 OF 2014 (*Thomas Cook vs. Competition Commission of India*) wherein the COMPAT has held that:

> *".....the appellants never tried to suppress the market purchases of equity shares of SHRIL for the purpose of obtaining any advantage under the Act. Rather, in the notice filed on 14.02.2014 under Section 6(2), they had made a categorical reference to the transaction involving the market purchase of the equity shares of SHRIL. Therefore, the penalty imposed by the Commission cannot be sustained by assuming that the appellants deliberately flouted the mandate of Section 6(2) of the Act."*

8.2 That in Appeal no. 34 of 2013 (*AR Polymers case*), the COMPAT has held that penalty should not be ordinarily imposed unless the party acted deliberately in defiance of law or acted in conscious disregard of its obligations. Further, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act.

8.3 That the procedural bonafide error, if any, cannot outweigh the substantive approval, especially when the parties have proceeded to obtain clearances from FIPB and other jurisdictions. Further, the doctrine of proportionality must be adhered to for cases where there are minor procedural lapses based on bonafide belief of the parties.

9. In this regard, it is noted that sub-section (2) of Section 6 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" (emphasis added)

10. Further, sub-section (2A) of Section 6 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"

11. Thus, in terms of sub-section (2) of Section 6 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 sub-section (2A) of Section 6 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 Commission has passed any order under Section 31 of the Act, whichever is earlier.

12. On the basis of information given by the Acquirer, it is noted that the Acquirer along with Novartis meet the thresholds prescribed under clause (a) of Section 5 of the Act and therefore the acquisition of NAH by Eli Lilly is a notifiable combination to the Commission.

13. With respect to the submissions of the Acquirer, as mentioned above, the Commission observed as under:

13.1 The term "*enterprise*", as defined under clause (h) of Section 2 of the Act, means "*a person or a department of government*…". Further, the term "*person*" in terms of clause (l) of Section 2 of the Act has been defined as follows:

"*person" includes—*

(i) an individual;

(ii) a Hindu undivided family;

(iii) a company;

(iv) a firm;

(v) an association of persons or a body of individuals, whether incorporated or not, in India or outside India; or

(vi) any corporation established by or under any Central, State or Provincial Act or a Government company as defined in section 617 of the Companies Act, 1956 (1 of 1956);

(vii) any body corporate incorporated by or under the laws of a country outside India;

(viii) co-operative society registered under any law relating to cooperative societies;

(ix) a local authority;

(x) every artificial juridical person, not falling within any of the preceding sub-clauses"

13.2 A plain reading of all the categories covered under the definition of a "*person*" suggests that only an entity which has separate legal personality is covered under the term "*person*". A business division of an enterprise, such as NAH, is not an artificial juridical person as it does not have a distinct legal personality from that of the enterprise which houses the business division. Thus, a business division is neither covered in any of the sub-clauses from (i) to (ix) as mentioned above nor is covered under sub-clause (x) as it does not have a separate legal/juristic personality.

13.3 Further, the Commission noted that Novartis is a company incorporated under the laws of Switzerland and qualifies as a "*person*" under sub-clause (vii) of clause (l) of Section 2 of the Act. It cannot be accepted that NAH which is a part of Novartis, is also separately covered under the definition of "*person*".

13.4 For reasons discussed above, the Commission is of the considered view that the business divisions and/or units do not qualify as person or enterprise. Accordingly, NAH, being a business division of Novartis is not a person and therefore not an enterprise. Thus, the Acquirer's argument that the assets forming the business being acquired must be considered as an "enterprise" for the purpose of De Minimis Exemption is incorrect and deserves to be rejected.

13.5 It is observed that the De Minimis Exemption, which applies to enterprises, would apply either to Novartis or Novartis India but not to NAH. It is noted from the annual reports of Novartis, for the financial year preceding the date of execution of SAPA, that value of assets and turnover of Novartis exceeds the value of asset and turnover set out in the De Minimis Exemption.

13.6 In relation to the argument of the Acquirer about the applicability of the De Minimis Exemption to Novartis India, it is observed that even Novartis India also does not qualify for the same, for the reason that the value of assets and turnover of Novartis India exceeds the value of asset and turnover set out in the De Minimis Exemption. The Commission observed that the Acquirer has excluded the value of assets and turnover of the transferred over-the-counter business of Novartis India while calculating thresholds for the purpose of De Minimis Exemption[2]. Thresholds for the purpose of De Minimis Exemption are to be determined with reference to book value of the assets and turnover shown in the audited books of accounts of the enterprise for the financial year immediately preceding the financial year in which the combination is being entered into. In this case, at the time of the execution of the SAPA (i.e., on 22.04.2014), Novartis India had not yet put into effect the sale of its over-the-counter business i.e. for the financial year preceding the date of execution of SAPA, the over-the-counter business was part of Novartis India. It is noted from the annual reports of Novartis India, for the financial year preceding the date of execution of SAPA, that value of its assets and turnover exceeds the value of asset and turnover set out in the De Minimis Exemption and therefore the combination is not exempt from notification to the Commission as it does not qualify for the De Minimis Exemption.

13.7 In relation to the Acquirer's arguments on consistency between Indian law and the ICN best practices, it is noted that recommended practices of the ICN, which are in the nature of guidelines, are to be adopted by each jurisdiction in consonance with their law. The

[2] In 2014, GlaxoSmithKline plc ("**GSK**") and Novartis entered into an agreement for formation of a consumer healthcare joint venture, in which GSK would have an equity interest of 63.5 per cent and Novartis, will hold the remaining 36.5 per cent equity interest. Further, GSK contributed its global consumer health care business and Novartis contributed its over-the-counter consumer healthcare business. The said transaction was approved by the Commission on 12.12.2014 vide Combination Registration No. C-2014/07/188 .

De Minimis Exemption sets out in clear terms that it applies only to the enterprise, whose assets, control, shares, voting rights or assets are being acquired and not to a business division or the assets being acquired.

13.8 Further, the contention of the Acquirer that the Commission does not have any informal guidance on its website on the manner in which the Commission calculates the value of assets and turnover for purposes of the jurisdictional thresholds of Section 5 of the Act, needs to be seen with the fact that the Commission offers pre-filing consultation to anyone that requires clarification on the filing requirements. The Acquirer had not approached the Commission for any clarifications on the filing requirements in respect of the present combination.

13.9 In relation to the relevant trigger document in the instant case, the Commission noted that the combination relates to Eli Lilly's acquisition of the global veterinary pharmaceuticals business of Novartis. Though, the parties had entered into the local SSA for the purposes of the transfer of the India business, the SAPA sets out the material terms and conditions pertaining to the transfer of NAH to Eli Lilly and creates a binding obligation on the parties. Further, SAPA also provides that in case of conflict between SAPA and the local agreement to be executed between the Parties, SAPA will prevail over the said local agreement. It is observed that upon the execution of the SAPA and the satisfaction of the thresholds under Section 5 of the Act by the parties to the SAPA (*viz*., Novartis and Eli Lily), filing obligation under sub-section (2) of Section 6 of the Act was triggered. Accordingly, the Commission is of the considered view that the agreement for acquisition under clause (b) of sub-section (2) of Section 6 of the Act is the SAPA dated 22.04.2014 executed between Eli Lilly and Novartis and not the SSA entered into between Elanco India and Novartis India on 03.12.2014.

13.10 For the sake of argument, even if it is accepted that SSA was the trigger document for the purpose of determining filing obligation under clause (b) of sub-section (2) of Section 6 of the Act, then also there has been a delay. The SSA was executed on 03.12.2014 and accordingly, the notice should have been filed with the Commission within 30 days of execution of SSA i.e., by 01.01.2015. However, the notice was filed with the Commission only on 09.07.2015, with a delay of more than 6 months.

13.11 In relation to the Acquirer's argument that the combination has not been consummated in India, the Commission in *Baxalta/Baxter (Order under Section 43A of the Act in C-2015/07/297)* has already held as under which is applicable in present case also:

> *"……..in cases of global combinations (as in the present case), if the parties to the combination notify the combination to the Commission only upon the execution of a local agreement and not after execution of the global agreement, in spite of meeting jurisdictional thresholds prescribed under Section 5 of the Act, then there is possibility that the combination would be consummated at the global level even before the Commission has assessed the same under the relevant provisions of the Act (as has happened in the instant case). In such a situation,the independent market behaviour of the parties to the combination has already ceased even before the Commission carried out its assessment of the combination, which would defeat the purpose of the suspensory regime of regulation of combinations provided by Section 5 and 6 of the Act."*

In this regard, it is further noted from the submissions in the Notice that the Indian entities of both the Parties which were engaged in animal health products in India were largely dependent on imports from their respective parent entities for their business operations in India. Since the combination was already consummated in all other jurisdictions and the NAH business has been acquired by Eli Lilly overseas, it cannot be accepted that the Parties were acting independently of each other in India.

13.12 Further, the Commission in *Baxalta/Baxter (Order under Section 43A of the Act in C-2015/07/297)* has held as under*:*

> "*The words "proposes" and "proposed" used in sub-section (2) of Section 6 of the Act implies that a combination which is being notified to the Commission under the said section should be a proposed combination at the time of filing of the notice with the Commission…….*
>
> *In addition to this, the Commission further observes 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."

In the instant case, the combination was already given effect on 01.01.2015 i.e. it was neither a *proposed* combination at the time of filing of the Notice with the Commission, as required by sub-section (2A) of Section 6 of the Act nor it remained a *proposed* combination till the expiry of time specified in sub-section (2A) of Section 6 of the Act.

13.13 In relation to the contention of the Acquirer that they did not conceal the arrangement, it is noted that in the instant case, the Commission took *suo-moto* cognisance of the combination and initiated an inquiry under sub-section (1) of Section 20 of the Act. The Acquirer filed the notice with the Commission only after receipt of letter from the Commission inquiring about the combination.

13.14 As regards the argument of the Acquirer that it was merely a procedural bonafide error and should not outweigh the substantive approval, it is noted that in the instant case the Acquirer has not merely delayed filing of the notice with the Commission but also failed to file the notice with the Commission. In the event that the Commission would not have taken *suo moto* cognisance of the combination, it would have escaped the scrutiny of the Commission as to whether the combination has resulted in appreciable adverse effect on competition 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.

14. It is also noted that the Hon'ble COMPAT, while passing its order in *AR Polymers case*, has referred to the judgement of Hon'ble Supreme Court in *Hindustan Steel Ltd. vs. State of*

Orissa [1970] SC 253 wherein, the Hon'ble Supreme Court has also observed that "*…Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances…".* It is further noted that the Hon'ble Supreme Court has held in *The Chairman, SEBI v Shriram Mutual Fund and Anr.,* 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…".* In line with the orders of the Hon'ble Supreme Court, the Commission has considered all relevant factors in the present case.

15. In view of the foregoing, the Commission is of the opinion that the Acquirer along with Novartis meet the thresholds prescribed under clause (a) of Section 5 of the Act and therefore the acquisition of NAH by Eli Lilly is notifiable to the Commission in accordance with sub-section (2) of Section 6 of the Act. Further, the said combination was not covered by the De Minimis Exemption, as explained above. The Commission also noted that the parties has given effect to the combination before the expiry of 210 days from the date of filing of the notice with the Commission or the Commission has passed any order under Section 31 of the Act, whichever is earlier.

16. Thus, the Acquirer failed to give notice to the Commission in accordance with the requirements of sub-section (2) of Section 6 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. As per the details provided by the Parties, the value of their worldwide assets and turnover for the year ending 31.12.2013, are as follows:

Party	Assets (in USD Million)	Turnover (in USD Million)
Eli Lilly	35,248.70	23,113.10
Novartis	126,254.00	57,920.00
Total	**161,502.70**	**81,033.00**

18. Accordingly, in terms of Section 43A of the Act, the Commission can levy a maximum penalty of one per cent of the combined value of worldwide assets of the Parties i.e. USD 1,615 million (approximately INR 10,700 crore). However, the Commission has sufficient discretion to consider the conduct of the Parties and the circumstances of the case to arrive at an appropriate amount of penalty. Accordingly, the Commission considered totality of factors, while determining the quantum of penalty. In view of the foregoing, applying the principles of proportionality, the Commission considered it appropriate to impose a penalty of INR 1,00,00,000/- (INR one crore only) on the Acquirer, which is approximately 0.00009 per cent of the combined value of worldwide assets of the Parties.

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

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