



**COMPETITION COMMISSION OF INDIA**  
(Combination Registration No. C-2015/03/256)

31<sup>st</sup> August 2015

**Notice under sub-section (2) of Section 6 of the Competition Act, 2002 jointly filed by  
Grasim Industries Limited and Aditya Birla Chemicals (India) Limited**

**CORAM:**

Mr. Ashok Chawla  
Chairperson

Mr. S. L. Bunker  
Member

Mr. Sudhir Mital  
Member

Mr. Augustine Peter  
Member

Mr. U. C. Nahta  
Member

Mr. M. S. Sahoo  
Member

Mr. G. P. Mittal  
Member

**Legal Representative of the parties:** Khaitan & Co.

**Order under sub-section (1) of Section 31 of the Competition Act, 2002**

1. On 10<sup>th</sup> March 2015, the Commission received a notice ('**Notice**') under sub-section (2) of Section 6 of the Competition Act, 2002 ('**Act**') jointly filed by Grasim Industries Limited ('**Grasim**') and Aditya Birla Chemicals (India) Limited ('**ABCIL**') (Grasim and ABCIL are hereinafter referred to as '**Parties**').



2. The proposed combination relates to the merger of ABCIL with Grasim, pursuant to a scheme of amalgamation (**‘Scheme’**) approved by their respective board of directors on 11<sup>th</sup> February 2015 under the relevant provisions of the Companies Act, 1956 (**‘Proposed Combination’**).
3. Grasim is a listed company incorporated under the Companies Act, 1956. It is engaged in, *inter alia*, the manufacture and sale of viscose staple fibre (**‘VSF’**), cement and chemicals. According to the Parties, the chemical business of Grasim is essentially a backward integration for the manufacture of VSF. The chemical business of Grasim primarily consists of the manufacture of caustic soda, liquid chlorine, hydrochloric acid, hydrogen, aluminium chloride, stable bleaching powder (**‘SBP’**), chlorinated paraffin wax (**‘CPW’**), poly aluminium chloride (**‘PAC’**), chloro-sulphonic acid, calcium chloride etc.
4. ABCIL, a subsidiary of Hindalco Industries Limited (**‘Hindalco’**)<sup>1</sup>, is a listed company incorporated under the Companies Act, 1956. It is engaged in the manufacture and sale of chemicals. It manufactures caustic soda, liquid chlorine, hydrochloric acid, hydrogen, aluminium chloride, SBP, CPW, PAC and phosphoric acid.
5. It is observed that both Parties are engaged in the manufacture of certain common products, including caustic soda, liquid chlorine, hydrochloric acid, hydrogen, aluminium chloride, SBP, PAC and CPW.
6. As the Notice was incomplete in certain aspects and certain additional information was required from the Parties, letters were issued under Regulation 14 and/or Regulations 5 and 19 of the Competition Commission of India (Procedure in regard to transaction of business relating to combinations) Regulations, 2011 (**‘Combination Regulations’**). The said letters were issued on 19<sup>th</sup> March 2015, 1<sup>st</sup> April 2015, 17<sup>th</sup> April 2015, 24<sup>th</sup> April 2015, 12<sup>th</sup> May 2015, 20<sup>th</sup> May 2015, 11<sup>th</sup> June 2015, 24<sup>th</sup> June 2015 and 20<sup>th</sup> July 2015. Each of the abovesaid letters was issued in continuation to the Commission’s preceding communication, as the responses submitted by the Parties were incomplete

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<sup>1</sup> *Hindalco is the promoter of ABCIL. It holds 54.64% of the equity share capital of ABCIL (51.33% directly and 3.31% through its 100% subsidiary Renuka Investment and Finance Limited).*



in certain aspects. The Parties submitted their responses ('Responses') to the Commission's letters after seeking extensions in some cases.

7. The Commission considered the proposed combination in its meetings held on 27<sup>th</sup> May 2015, 15<sup>th</sup> June 2015, 22<sup>nd</sup> June 2015 and 20<sup>th</sup> July 2015, wherein it was decided to seek certain information from the Parties in relation to the said combination. The Commission further considered the submissions of the Parties and other information available on record in its meeting held on 31<sup>st</sup> August 2015.
8. The Parties have submitted that during the manufacture of caustic soda<sup>2</sup>, products such as the liquid chlorine, hydrochloric acid and compressed hydrogen are produced as by-products. Further, a few value added products ('VAPs') are also manufactured by the Parties using the liquid chlorine and hydrochloric acid so generated. These VAPs are all chlorine derivatives (i.e., chlorine is used in the manufacture of all of these products) and include SBP, aluminium chloride, calcium chloride, CPW, chloro-sulphonic acid, PAC, etc. It has been submitted that the market share of the combined entity (in value terms) in each of the overlapping products is as follows: caustic soda (less than 20%), liquid chlorine (less than 20%), hydrochloric acid (less than 10%), aluminium chloride (less than 45%), SBP (less than 65%), PAC (less than 60%) and CPW (less than 20%).
9. The Parties have submitted that the Proposed Combination is a merger between two companies belonging to the Aditya Birla Group. Given their high market shares in SBP and PAC, the Parties, *vide* their letter dated 18<sup>th</sup> August 2015, have submitted a voluntary modification, to limit the ex-plant prices of two products, namely, SBP and PAC, under sub-regulation (2) of Regulation 19 of the Combination Regulations. However, given that SBP and PAC markets are primarily bidding markets, the Commission decided that the voluntary modification submitted by the Parties may not be appropriate in the present case.

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<sup>2</sup> Caustic soda is the primary product that is used for producing alumina and VSF.



10. It was noted by the Commission that the Parties failed to provide substantial details in the Notice that the two companies belong to the same group. It is noted that Hindalco is the majority shareholder and parent company of ABCIL and that there are certain common shareholders in Hindalco and Grasim. These common shareholders consist of: (i) individual shareholders; and (ii) certain companies which are, directly or indirectly, controlled by the said individual shareholders. Taken together, these shareholders hold 25.45% in Hindalco and 34.59% in Grasim, respectively.
11. The Parties *vide* their Responses have submitted that since Mr Kumar Mangalam Birla, his family and the entities controlled by them (**'Promoters'**) constitute the single largest shareholder group in both ABCIL and Grasim, and other shareholders are dispersed, the Promoters have the ability to exercise decisive influence over ABCIL and Grasim. In this regard, the Parties have submitted that the Promoters, for the past three years, have voted together as a single voting bloc on all resolutions passed in the shareholders' meeting of Hindalco (parent company of ABCIL) and Grasim.
12. Based on the past voting patterns of Hindalco, ABCIL and Grasim and other factors such as appointment of directors, it is noted that the Promoters have the ability to exercise decisive influence over both ABCIL and Grasim. The Parties have also submitted that ABCIL and Grasim have (i) common management level employees, (ii) common procurement and marketing teams, (iii) common logistics management. Further, as submitted by the Parties, customers view the Parties as being part of the Aditya Birla Group and interact with them accordingly. Based on the above, it is observed that the Parties are not likely to have exercised a competitive constraint on each other irrespective of the Proposed Combination.
13. Considering the facts on record, the details provided in the Notice and the assessment of the Proposed Combination on the basis of factors stated in sub-section (4) of Section 20 of the Act, the Commission is of the opinion that the Proposed Combination is not likely to have an appreciable adverse effect on competition in India and, therefore, the Commission approves the Proposed Combination under sub-section (1) of Section 31 of the Act.



14. The Commission observes that the approval of the Proposed Combination would have no effect, whatsoever, on any ongoing or future enquiry/investigation under the relevant provisions of the Act, in respect of the Parties.
15. This Order shall stand revoked if, at any time, information provided by the Parties is found to be incorrect.
16. The Secretary is directed to communicate to the Parties accordingly.



## DISSENT NOTE

### PER

Augustine Peter  
(Member)

1. The majority of the learned Members of the Commission has ordered that :

*“considering the facts on record, the details provided in the Notice and the assessment of the proposed combination on the basis of factors stated in sub-section (4) of section 20 of the Act, the Commission is of the opinion that the Proposed Combination is not likely to have an appreciable adverse effect on competition in India and, therefore, the Commission approves the Proposed Combination under sub-section (1) of Section 31 of the Act”.*

2. I am not in a position to agree with the majority of the Members of the Commission as the conclusion arrived at by the majority, according to me, is based on incorrect premises based on the information furnished by Parties.
3. Therefore, I am writing a separate order.
4. The majority of the Members came to the above conclusion based on the following information:
  - i. Both the parties are engaged in the manufacture of certain common products, including caustic soda, liquid chlorine, hydrochloric acid, hydrogen, aluminium chloride, SBP, PAC and CPW.
  - ii. A few value added products (VAP) are produced by the parties using the liquid chlorine and hydrochloric acid as part of the production of caustic soda. These are chlorine derivatives and include SBP, aluminium chloride, calcium chloride, CPW, chlorosulphonic acid, PAC etc.
  - iii. It has been submitted by the parties that the market share post combination (in value terms) in each of the overlapping products is as follows: caustic soda (less than 20%), liquid chlorine (less than 20%), hydrochloric acid (less than 10%), aluminium chloride (less than 45 %), SBP (less than 65 %), PAC (less than 60%) and CPW (less than 20 %).



- iv. The Parties have submitted that the Proposed Combination is a merger between two companies belonging to the Aditya Birla group.
  - v. Based on the past voting patterns of Hindalco, ABCIL and Grasim and other factors such as appointment of directors, it is noted that the Promoters have the ability to exercise decisive influence over both ABCIL and Grasim. The Parties have also submitted that ABCIL and Grasim have (i) common management level employees, (ii) common procurement and marketing teams, (iii) common logistics management. Further as submitted by the Parties, customers view the Parties as being part of the Aditya Birla Group and interact with them accordingly. Based on the above it is observed that the Parties are not likely to have exercised a competitive constraint on each other irrespective of the Proposed Combination.
5. The matter was decided by the majority based primarily on (iv) and (v) above.
  6. Competition Act, 2002 requires mandatory notification of combination. Assets and turnover thresholds for notifiability are prescribed by the Act, and are modifiable by the Government as prescribed under section 20(3) of the Act. The basic concern is with the existence or likelihood of the proposed combination causing appreciable adverse effect on competition in the relevant market in India. The process of combination analysis by the Commission is therefore broken down into: (a) delineation of the relevant market (product and geographic); (b) identification of overlap in the relevant market; and *finally*, (c) subjecting the combination to competition analysis under section 20(4) of the Act to ensure that there is no appreciable adverse effect on competition in the relevant market. The test under section 20(4) of the Act is whether the benefits of the combination outweigh the adverse impact of the combination, if any.
  7. The delineation of the market as well as identification of the market shares of the parties post combination is not being questioned here as the information has been provided by the Parties. Section 20(4) of the Act prescribes that the Commission shall have due regard to all or any of the factors provided therein while deciding if a proposed combination causes or is likely to cause appreciable adverse effect on competition in the relevant market.
  8. While a number of factors have been prescribed by the Act for analyzing the appreciable adverse effect on competition by a combination, market share in the relevant market serves as the most expedient first filter. The relevant market has been suggested by the Parties as India. The majority order has proceeded on this basis.
  9. Overlapping products/services in the relevant market is the next step for competition assessment. The major relevant product markets with overlaps are caustic soda, liquid



chlorine, hydrochloric acid, aluminium chloride, SBP, PAC and CPW. And the market shares of the combining parties together in India in the overlapping products as furnished by the combining parties are: caustic soda (less than 20%), liquid chlorine (less than 20%), hydrochloric acid (less than 10%), aluminium chloride (less than 45 %), SBP (less than 65 %), PAC (less than 60%) and CPW (less than 20 %). Market share, on a stand-alone basis, however, does not give any pointer to the effect on competition in the market. Much also depends on the relative market power of competitors, actual and potential import competition, entry barriers etc., as provided in section 20(4) of the Act. It is noticed that the market shares of the combined parties in respect of the overlapping products vary from 10 per cent to 65 per cent, as per the information furnished by the parties. This requires closer look keeping in view other factors prescribed under section 20(4) of the Act.

### **Markets with Appreciable Adverse Effect on Competition:**

10. Given the overlap in the relevant products of the two combining parties and after careful consideration of the market shares of the parties in the relevant market, it is noticed that two Value Added Products viz. SBP and PAC in which Grasim and ABCIL (for FY 2013-14) have combined market shares of less than 65 per cent and less than 55 per cent respectively, both in terms of value and in terms of volume, which raise competition concerns. The combined market shares excluding captive consumption and group sales come to 64.71% and 54% for SBP and PAC for the year 2013-14. Such high market shares is pointer to, though not conclusive of, *appreciable adverse effect on competition* in the relevant market.
11. The market shares of competitors in the relevant market is the next useful filter. The competitive constraint to the combining parties in the case of SBP is limited, with Sri Rayalaseema Alkalies & Chemicals (less than 10 %), Solaris Chemical Industries Ltd (SIEL) (less than 10%) (acquired by ABCIL in 2013), DSCL (about 5%) and Gujarat Alkalies & Chemicals (about 5%) in FY 2013-14.
12. Similar is the post combination scenario in respect of PAC. The major competitors in the PAC market are Gujarat Alkali Chemical Ltd (nearly 20 %), Synergy Multichem (less than 10%), Andhra Sugar (above 5%), Arkyl (above 5 %), and Pacific Chemicals (just below 5 %). The combined entity with over 50 per cent market share is far ahead of its competitors.
13. However, neither the market shares of the combining entities nor those of the competitors by themselves may give any pointer to the effect of a combination on competition in the relevant market. Much also depends on entry barriers, actual and potential import competition and other factors as provided in section 20(4) of the Act.



This requires a closer look keeping in view other factors prescribed under section 20(4) of the Act.

14. These factors in the instant case are looked at in terms of the relevant provisions in the Act, in the following paragraphs:

***Appreciable Adverse Effect on Competition under section 20(4) of the Act***

15. The Act in section 20(4) envisages the factors, to all or any of which the Commission shall have due regard, for the purpose of determining whether a combination would have the effect of or likely to have appreciable adverse effect on competition in the relevant market. These factors in section 20 (4) (a) to (n) have been carefully looked at in the following paragraphs:

***(a) Actual and potential level of competition through imports in the market***

The share of imports in total caustic soda consumption is around 12 per cent in 2013-14. Caustic soda prices are higher domestically. However, competition from imports does not constrain domestic sales due to factors including antidumping duty on imports.

***(b) Extent of barriers to entry into the market***

Though the technology of ‘chlor-alkali’ manufacturing process is well known and does not pose a barrier to entry, there are numerous laws and regulations requiring clearances from different licensing authorities in the country. Chemical processes result in pollution of all elements such as air, water and land, and hence requires clearances from a number of pollution regulating authorities. In addition adherence to standards set by Bureau of Energy Efficiency is also required. These regulations create entry barriers to the chemical manufacturing industry for any new entrant though the existing players can expand, subject to necessary clearances and depending upon their requirements and abilities.

***(c) Level of combination / concentration in the market***

Two of the overlapping products identified as raising *prima facie* competition issues are SBP and PAC. Pre-combination the market for SBP and PAC are already moderately concentrated with pre-combination HHI of more than 2300 and more than 2400 respectively.



Post combination the market for both SBP and PAC shall become highly concentrated with post-combination HHI of more than 4300 and about 3600 respectively. Notable here is the incremental HHI in case of both the products SBP and PAC. The incremental change in HHI *post combination* is about 2000 and above 1100 respectively, which is enormously large as is evident from the fact that mergers resulting in highly concentrated markets that involve an increase in the HHI of more than 200 points is presumed in certain major jurisdictions to be likely to lessen competition in the relevant market.

***(d) Degree of countervailing power in the market***

The customers appear to have only limited countervailing buying power since SBP and PAC do not have close substitutes in the market. SBP is primarily used as a disinfectant and PAC is used for treating water. Transport costs are significant relatively to the cost of the products and hence customers prefer to buy from the nearest possible seller and are therefore constrained. There have been issues raised regarding cartelization in the market involving the parties, which, if proved, would indicate the absence of countervailing power by the consumers.

***(e) Likelihood that combination would result in the parties to the combination being able to significantly and sustainably increase price or profit margins***

The market shares of combining parties as regards SBP and PAC have steadily been increasing during the past 4 years, especially that of ABCIL starting with the acquisition of the chlor-alkali divisions of Kanoria Chemicals in 2011. Kanoria chemicals, along with the combining parties were the three most important players in the sector in 2011. Together the combining parties hold about one third and above 50 % market share of SBP and PAC respectively which is a significant power in the market.

Such high market shares of the combining parties and the financial resource of the group to which the combining parties claim to belong, create a strong likelihood that the parties would be able to significantly and sustainably increase price, post combination.

***(f) Extent of effective competition likely to sustain in a market***

The extent of effective competition in the relevant market is likely be weakened post combination since there are no major competitors left in the field in the production of SBP and PAC. The combined market share of the parties is large, especially in respect of these two products. The market structure pre-combination itself is highly concentrated with very high HHI levels as indicated above.



Besides, one of the combining parties have been involved in more than one merger /acquisition in the sector during the last four years. Even after the current merger application ABCIL is reported to have been involved in negotiating a major merger in the relevant market. Such aggressiveness on the part of the merging parties does not bode well for effective competition in the relevant market in the future.

***(g) Extent to which substitutes are available in the market***

**SBP**

Parties have submitted that SBP has substitutable product in High Strength SBP (HSSBP). However, the Parties themselves are not in the business of manufacturing or supplying this product. Prices are also significantly different. There is no indication to believe that HSSBP could provide any competitive constraint to SBP in the relevant market.

**PAC**

PAC is predominantly used as a coagulant in drinking water treatment and as a sizing agent in paper industry. Parties have indicated that Alum can be used for treating water in place of PAC. However, PAC has better properties and is significantly more expensive than Alum. Hence Alum cannot be treated as a substitute.

***(h) Market share, in the relevant market, of the persons or enterprise in a combination, individually and as a combination***

The market shares of the combining parties together in India in the overlapping products as furnished by the combining parties are: caustic soda (less than 20%), liquid chlorine(less than 20%), hydrochloric acid (less than 10%), aluminium chloride (less than 45 %), SBP (less than 65 %), PAC (less than 60%) and CPW (less than 20 %).

For SBP, the market share of Grasim and ABCIL are less than 40 % and less than 25% respectively and combined market share would become nearly two third. For PAC, the market share of Grasim and ABCIL are over 40% and nearly 15% respectively and the combined market share would become above 55%. In both the above cases significant increase of market power is noticed.

***(i) Likelihood that the combination would result in the removal of a vigorous and effective competitor or competitors in the market.***



One of the parties (ABCIL) acquired in 2011 the chlor-alkali division of Kanoria Chemicals which was a vigorous competitor. In May, 2013 the 'chlor –alkali' division of Solaris Chemtech Industries Ltd (SCIL) was acquired by ABCIL. Recently, subsequent to the filing of the present combination proposal with the Commission, ABCIL is reported to have been negotiating new acquisitions in the sector. The remaining significant competitors are Gujarat Alkali Chemicals Ltd. and Sri Rayalaseema Chemicals Ltd. with relatively very small market shares in SBP and PAC compared to the combining parties.

***(j) Nature and extent of vertical integration in the market***

SBP and PAC are vertically linked to the production of Caustic Soda since they are manufactured using the by-products (Chlorine and Hydrochloric acid) resulting from the manufacture of Caustic Soda. Caustic Soda (chemically known as Sodium Hydroxide) and Chlorine are produced together through the electrolysis of common salt solution (Sodium Chloride or Brine). Caustic Soda and Chlorine are generated in the ratio of 1:0.89.

Hence the production of SBP and PAC by the parties is largely dependent on the demand for Caustic Soda by the parties and market.

Vertical integration makes it conducive for the post combination entity to raise price.

***(k) Whether the benefits of the combination outweigh the adverse impact of the combination, if any.***

A close look at all the factors in section 20(4) of the Act indicate that the combination, especially as it concerns the two identified products, raises competition concerns. The market structure pre combination itself is highly concentrated with very high HHI level as indicated above. Besides, the combining parties have been engaged in a merger /acquisition spree during the last four years, i.e. since 2011, coinciding with and post the merger regulation enforcement in the country. Even after the current merger application ABCIL is reported to have been involved in new merger negotiations in the relevant market. Chemical industry, especially the 'chlor alkali' sector, faces various regulatory barriers to entry and one does not see many new entrants. Most of the activity is through brown field investment/ expansion of existing facilities. Post combination HHI and incremental HHI are abnormally above the levels of 'regulatory tolerance'. Countervailing buyer power is limited. Substitutes are not available for the two identified products, which pose competition concerns. The ability of the combining parties to raise price on a sustainable basis, at least in respect of



these products is high. Hence, the tendency of the combining parties to acquire competitors raises concern.

Against this the combining parties have advanced very general types of benefits that are expected to accrue from the merger. The proposed merger would, therefore, only sub-serve the objectives of consolidation of the chlor alkali business of the combining parties without any perceptible benefits accruing to the economy or to other stakeholders, especially consumers. On the other hand, post combination price rise on a sustainable basis is a clear possibility. There is no doubt that *prima facie* the negative effects of the proposed combination outweighs the benefits indicated by the parties.

16. The majority of the learned Members have not analyzed in detail the likelihood of appreciable adverse effect of this combination because their conclusion is primarily based on the assumption (based on the submission of the parties) that both the combining entities are part of the same ‘group’ due to which the market structure pre and post combination remains the same, having no impact on competition in the relevant market. They have also come to the conclusion that there is no *appreciable adverse effects on competition* in the relevant market.
17. It is therefore, important to look at the concept of ‘group’ for competition analysis purposes, and see if they belong to the same group as has been claimed. It is also important to see whether, even if they belong to a ‘group’ as claimed, their combination can be approved without careful analysis of appreciable adverse effect on competition, as provided in section 20(4) of the Act and in case of *prima facie* finding of existence or likelihood of *appreciable adverse effect on competition* in the relevant market, without subjecting the process to the procedure for investigation as laid down in section 29(1) of the Act.
18. The parties have argued that the Explanation to section 5 of the Act provides that:
  - (a) “control” includes controlling the affairs or management by—
    - (i) one or more enterprises, either jointly or singly, over another enterprise or group;
    - (ii) one or more groups, either jointly or singly, over another group or enterprise;
  - (b) “group” means two or more enterprises which, directly or indirectly, are in a position to —
    - (i) exercise twenty-six per cent or more of the voting rights in the other enterprise; or
    - (ii) appoint more than fifty per cent of the members of the board of



directors in the other enterprise; or  
(iii) control the management or affairs of the other enterprise

19. **What is important is that this ‘definition’ is for the purpose of section 5 only as explicitly stated in the Act itself.** And section 5 of the Act, in fact, prescribes the minimum thresholds for mandatory notification. Indian combination regime is based on mandatory notification requirement as per section 6 of the Act. Every enterprise that satisfies the thresholds specified in section 5 of the Act has to notify the merger/amalgamation/acquisition/acquisition of control to the Commission and wait for a period of 210 days. Commission can approve, reject or approve with modification the proposed combination.
20. The concept of ‘group’ has been brought in under section 5 of the Act to specify the threshold for notification requirement. It is a *de minimis* shareholding/control threshold for entities interconnected by shareholding or directorship, above which notification is required, provided the asset/turnover threshold is also satisfied. For instance, the acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises shall be a combination of such enterprises and persons or enterprises, if—
- Section 5 (a).....
- (ii) “the group, to which the enterprise whose control, shares, assets or voting rights have been acquired or are being acquired, would belong after the acquisition, jointly have or would jointly have”,— (assets /turnover thresholds indicated...)
- Again,
- Section 5 (b)
- (ii) “the group, to which enterprise whose control has been acquired, or is being acquired, would belong after the acquisition, jointly have or would jointly have”,— (assets /turnover thresholds indicated...)
21. It is thus clear that the definition of ‘group’ visualizes a post-combination scenario, with the intention of capturing the minimum level of shareholding/control, which together with the *de minimis* asset/turnover as specified in the section, could act as a base level filter for notification and for competition analysis for evaluating likely effect in the relevant market post combination. Nothing more should be read into this concept of ‘group’. And the Explanation to section 5 of the Act explicitly acknowledges that this definition is only for section 5.



22. Let us take this idea further. Item 2 of Schedule I to ‘*The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011*’ (Combination Regulation) dealing with ‘*Categories of transactions not likely to have appreciable adverse effect on competition in India*’ (Regulation 4) provides as follows:

*“ In view of the duty cast upon the Commission under section 18 and powers conferred under section 36 of the Act, and having regard to the mandate given to the Commission to, inter- alia, regulate combinations which have caused or are likely to cause appreciable adverse effect on competition in terms of sub-section (1) of section 6 of the Act, it is clarified that since the categories of combinations mentioned in Schedule I are ordinarily not likely to cause an appreciable adverse effect on competition in India, notice under sub-section(2) of section 6 of the Act need not normally be filed.”*

And Item 2 of Schedule I of the Combination Regulation provides:

*“An acquisition of shares or voting rights, referred to in sub-clause (i) 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 the cases where the transaction results in transfer from joint control to sole control.**”(emphasis supplied)*

Item 9 of Schedule I of the Combination Regulation provides:

*“A merger or amalgamation of two enterprises **where one of the enterprises has more than fifty per cent (50%) shares or voting rights of the other enterprise, and/or merger or amalgamation of enterprises in which more than fifty per cent (50%) shares or voting rights in each of such enterprises are held by enterprise(s) within the same group:***

*Provided that the transaction does not result in transfer from joint control to sole control.”(emphasis supplied)*

23. This makes it clear that the concept of ‘group’ under section 5 is limited in application to that section, and to that section only, and cannot be extended for other purposes, including competition analysis of appreciable adverse effect on competition post combination. What is beyond doubt is that the zone between 26 per cent and 50 per cent shareholding is the zone where competition analysis is mandatorily to be conducted when interconnected enterprises are involved in combination. **That is: below 26 per cent shareholding is non notifiable (as a group) and above 50 per**



**cent shareholding is also non notifiable (as a group). In between is the zone where the combining parties have to be subjected to the test of section 20(4) of the Act for actual or likely appreciable adverse effect on competition in the relevant market.** Drawing conclusions diametrically contrary to this is what appears to be the submissions of the combining parties and what has been taken cognizance of by the majority of the Members.

24. Again when it comes to defining “enterprise”, section 2(h) of the Act states as follows:  
*“enterprise” means a person or a department of the Government, who or which is, or has been, engaged in any activity, .....either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places,.....(emphasis supplied)*
25. Thus the Act unequivocally defines an enterprise to comprise ‘unit(s)’ ‘division(s)’ and a ‘subsidiary(ies)’. A subsidiary has to be held to the extent of more than 50% by the holding company/entity. Thus the concept of ‘enterprise’ under the Act could cover more than one legally separate entity. In the instant case ABCIL could be considered as a subsidiary of Hindalco since more than 50 per cent of the shares of ABCIL is held by HINDALCO. However, HINDALCO, in turn, is held only to the tune of 34.59 by the promoters (submitted to be part of Aditya Birla group) as claimed by the parties to the combination. Moreover, the promoter group/promoters (part of Aditya Birla group) has common and cross shareholding only to the tune of 25.45 per cent in Grasim. No single juridical person or natural person holds more than 10 per cent shareholding in Grasim. What is evident from the information submitted by the parties is that the common promoter group which is part of the Aditya Birla group owns only 25.45 per cent in Grasim and effectively only 18.9 per cent in ABCIL. Companies Act, 2013 also provides that a ‘subsidiary’ company could mean a company in which the holding company “controls the composition of the Board of Directors” (Section 87(1)). However, in the instant case in view, inter alia, of what is noted in the forthcoming para 49(ii) below, I have not been convinced that HINDALCO, can be treated as a subsidiary vis-à-vis the promoters.
26. According to the information submitted by the parties, presence of common promoters and their shareholding is shown in Hindalco (the parent Co. of ABCIL) and Grasim and the common leadership. Further, it has been claimed by the parties in their reply that the executive management and leadership of both the ABCIL and of the chemical business of Grasim are common. This needs to be analyzed in two ways: (i) *de jure*: legally are they related as group companies?; and (b) *de facto*: whether in fact, by their ‘conduct’ in the market are they presenting themselves to the regulatory authorities, to the competitors and to the customers as group companies?



27. *De jure*, the Competition Act, 2002 provides that ‘enterprises’ owned to the extent of more than 50 per cent by a common holding company can be treated as forming part of the group and has exempted merger/amalgamations among them from the scope of combination regulations. The instant proposal is not covered under this. The common Promoter Group (which is stated to be part of the Aditya Birla Group) owns 25.45% in Grasim and only 18.9% of ABCIL.
28. The Parties have argued that *de facto* they are a ‘single economic entity’ and, therefore, pre and post combination relevant market scenario remains the same. The Parties have furnished the following information to support their claim that the combining parties are perceived as part of same group by the customers, suppliers, and other stake holders.
- i. Common leadership and executive management team led by Mr. Lalit Naik and Mr. K C Jhanwar provides strategic direction and guidance to the chemical business of Grasim and ABCIL;
  - ii. Common marketing team develops relationship with customers and negotiates contract for supply of chemical products. There are two separate verticals of marketing team, i.e., (a) ‘chlor alkali’ team responsible for Caustic Soda, Liquid Chlorine, Hydrochloric Acid and Hydrogen; and b) VAP team responsible for all value added products, i.e., SBP, PAC, CPW, Aluminium Chloride, etc. Both these verticals report to Mr. K C Jhanwar;
  - iii. Common procurement team develops relationship with suppliers and negotiates contract for procurement of (a) critical raw materials, i.e., salt, alumina hydrate, aluminium ingots, lime, HNP, packing materials, etc. and (b) capital items, i.e., membrane, electrolyzers, etc. Common procurement team also reports to Mr K C Jhanwar;
  - iv. Common human resources team handles the entire human resources process and talent management for the chemical business of Grasim and also for ABCIL; and
  - v. Both Grasim and ABCIL use the same logo.
29. While apparently their claim is sound, a competition authority cannot take statements by parties at face value. It is important to look at facts carefully:



- i. The most important fact to be looked at is whether their action of coordination is legal or not. It is submitted by the parties that there were efforts at restructuring the 'chlor alkali' business of the two combining enterprises, after the acquisition of the 'chlor alkali' division of M/s Kanoria Chemicals by ABCIL on 02-09-2011. What is important is that the 'Combination Regulations' and the related provisions of the Act (section 5 and 6) were notified on 11<sup>th</sup> May 2011 and these came into force *w.e.f.* 1<sup>st</sup> June 2011. Therefore, did the parties have the legal backing at that point of time to do what they did in the form of consolidation of their business, being competitors in the relevant market, which under the Act is horizontal agreement punishable under section 3(3) of the Act? Have the combining parties approached the Commission under section 5 and 6 of the Act before taking steps leading to horizontal coordination? Facts indicate that they did not. The common marketing team was also initiated by the combining parties only after the combination regulation (sections 5 and 6) came into effect. Same is the case with common procurement team and the use of common logo. The consistency of their behaviour with the provisions of law in force needs to be examined before conclusions are drawn.
  - ii. The next important fact to be looked at is if they have been consistent in their behavior as a 'single economic entity', subsequent to their coordinated behavior under the claim of 'single economic entity'. From the information furnished it is clear that they have not been consistent in their behavior as single economic entity, as claimed. As per information for the period 2013-14 the combining parties have been competing at least in the bidding market for PAC. In a total of 22 tenders ABCIL participated, in a majority i.e. 13 Grasim also bid; and of these 12 were won by ABCIL and 10 were lost by it. Of the tenders lost by ABCIL, 7 tenders were won by Grasim. This indicates a clear and explicit behavior where they competed in the open as recently as in 2013-14. Bidding information was sought from the parties only in respect of the two overlapping products where there appeared likelihood of *appreciable adverse effect* on competition. There is no information on other overlapping products.
30. Given this, the concept of 'single economic entity' in its application to competition law needs a closer look before we proceed further. The concept has evolved over the years in major competition jurisdictions. Competition authorities all the world over are concerned with 'economic units', irrespective of their legal status. Competition Act, 2002 deals with 'persons' and 'enterprises'. And an 'enterprise' as envisaged in section 2 (h) of the Act could consist of more than one legal entity. Thus 'subsidiaries' and 'holding company' could constitute one enterprise for combination analysis. Similarly

two subsidiaries of the same holding company/entity could also be treated as part of the same group.

31. While in mature jurisdictions like the US and EU the concept of ‘single economic entity’ had to evolve through case analysis, the Indian law clearly defines ‘economic unit’ for competition analysis purposes, in section 2(h). The focus of competition Act, 2002 is not ‘undertaking’ as under the MRTP Act, 1969. Section 2(h) envisages ‘enterprise’ as the focal point of the law. As referred above, ‘enterprise’ is defined in a comprehensive way to consist of ‘units’, ‘divisions’ and ‘subsidiaries’: and there is neither need nor scope for interpretation of the concept of ‘economic unit’ as the law is clear and unequivocal. While such concept evolved over a period of time in other major experienced jurisdictions, the Indian law had the benefit of integrating the experiences of other jurisdictions.
32. It is useful to briefly review the evolution of the concept in the US and EU, in particular. The US Supreme Court in *Copperweld* case<sup>1</sup> stated:

*“A parent and its wholly owned subsidiary have complete unity of interest. Their objectives are common not disparate; their general corporate actions are guided or determined not by two separate consciousness but by one. They are not unlike a multiple team of horses drawing a vehicle under the control of a single driver.....”*<sup>2</sup>

33. The US Supreme Court explained that:

*“....there can be little doubt that the operations of a corporate enterprise organized into divisions must be judged as the conduct of a single actor. The existence of an unincorporated division reflects no more than a firm’s decision to adopt an organizational division of labour ....”*<sup>3</sup> (emphasis supplied)

34. The clear reference to ‘unit’, ‘division’ and ‘subsidiary’ in the Indian law stands out against such evolution of law in the US.
35. In the Europe in the *Viho case*<sup>4</sup> quoting the decision in *Hydrotherm*<sup>5</sup> the European Court notes:

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<sup>1</sup> *Copperweld Corp v Independent Tube Cor*, 467 US 752 (1984) at p 771

<sup>2</sup> *Copperweld*, page 772

<sup>3</sup> *Copperweld*, page 772

<sup>4</sup> *Viho Europe BV v Commission* (1996) (ECR I-5457 at para 50)

<sup>5</sup> *Hydrotherm v. Compact* (1984) ECR 2999 at para 11



*“.. in competition law, the term ‘undertaking’ must be understood as designating an economic unit for the purpose of the subject-matter of the agreement in question even if in law that economic unit consists of several persons, natural or legal.”*

36. The European Court of Justice in *Shell v Commission*<sup>6</sup> is more specific about the concept when it observes that an ‘economic unit’ comprises:
- “ ... a unitary organization of personal, tangible and intangible elements which pursues a specific economic aim on a long term basis”* (emphasis supplied)
37. In case of a 100 per cent subsidiary there is a rebuttable presumption that there is ‘decisive influence’ exercised by the parent company over the wholly owned subsidiary’. Dealings between subsidiaries would also be considered as internal to a ‘single economic entity’.
38. When it comes to ‘combination’ the lesson from all the above is that transfer of business or asset from one ‘entity’ of the ‘single economic entity’ to another would not constitute a ‘combination’ because they are already combined as one entity. Naturally the Combination Regulation exempt such combination between holding company and subsidiary from the purview of combination regulations. There is no notification requirement.
39. On the other hand, when a subsidiary is not under the strict guidance of the holding company for economic activities and it is in competition in the market against another subsidiary, there may be scope for ‘rule of reason’ analysis as has been the practice (evolved) in mature jurisdictions. However, as regards non-subsidiaries, the Indian law is unequivocal and unambiguous that they are not part of a single ‘enterprise’ (‘single economic entity’)
40. When an entity is controlled by a single legal entity (natural person or juridical person) there is certainty and stability as regards ‘control’. However, when a group of natural persons together control a company *de facto*, the stability of that control has an element of uncertainty surrounding it. Past cannot be a guide for the future in that there is no guarantee that the same behavior by the group of natural persons or juridical persons or a combination thereof would continue in the future. This has been the experience in corporate India, especially in family controlled companies. Therefore, control of such nature cannot be sufficient reason to bestow ‘single economic entity’ status, which, for

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<sup>6</sup> *Shell v Commission (1992) ECR II-757 at para 311*



competition analysis, has very crucial implications - be it for 'agreements' or for 'abuse of dominance' or for 'combination'.

41. When 100 per cent subsidiary is involved there is rebuttable presumption as regards 'single economic entity' (Akzo Nobel case in the EU). As per this decision it must be presumed that the parent exercises decisive influence over the 100 per cent owned subsidiary. It is for the parent company to rebut such a presumption (obviously in the case of agreements/abuse of dominance). What needs to be proved when it is a less than 100 per cent subsidiary is the parent company's ability to exercise decisive influence over its subsidiary. Not just possess the ability but, in fact, it must have been exercising it<sup>7</sup>.
42. In *Elf Aquitaine* the assumption of decisive influence was applied even though the parent company owned only 98 per cent of its subsidiary<sup>8</sup>. In *Avebe* case<sup>9</sup> it was found that 50 per cent ownership could be sufficient to presume decisive influence<sup>10</sup>.
43. *Per se* attribution of 'single economic entity' status even to wholly owned subsidiaries has been abandoned by competition authorities in mature jurisdictions. In the initial stages of evolution of the concept of 'single economic entity' it was held that unless a firm is wholly owned by a parent company and unless they are pursuing a single long-term goal, they are expected to compete in the market. This is emphasized in the *American Needle v. National Football League* case where the football teams in fact are wholly part of NFL and still are subject of antitrust scrutiny under section 1 of the Sherman Act, let alone the case of 'partial' subsidiaries. The NFL argued that its teams formed a single economic entity and therefore they were not able to collude. Even though this argument was accepted by the lower courts the Supreme Court overruled it based on rule of reason analysis. Supreme Court's analysis based on detailed '*rule of reason*' led to the conclusion that while for some conduct, the NFL might be seen as a single entity, in other contexts the teams were acting independently. Even though NFL is a single firm (legal entity) in many respects, that does not bestow blanket immunity. This points to the fact that from competition perspective what is important is to carefully look at whether the parties are single entity in substance and not just in form, especially since competition laws apply to economic activity. In case the parties are

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<sup>7</sup> *General Quimicia and others v Commission, C-90/09 P, para 85*

<sup>8</sup> *Elf Aquitaine v Commission case T – 174/05, p.87*

<sup>9</sup> *Avebe v Commission, Case C-314/01*

<sup>10</sup> *Most of the jurisprudence on 'single economic entity' revolves around the responsibility of the parent for the violation of competition law, especially agreement or abuse of dominance by the subsidiary. And, therefore, the Competition Authority has the responsibility to prove 'decisive influence' by the parent over subsidiary*



separate actors pursuing separate economic interests, they cannot be exempted from competing since it deprives the market of independent centres of decision making<sup>11</sup>. The European Commission also considers firms as part of a single economic entity when the parent company owns directly or indirectly 100% of the shares in the subsidiaries as emphasized in the cartel case involving Akzo Nobel, BASF, and UCB<sup>12</sup>.

44. Let us now look at the proposal before us. The claim by the combining parties as regards 'single economic entity' is based on the fact that the Kumar Mangalam Birla Family and the entities controlled by the said family have the ability to exercise decisive influence over the combining parties viz. ABCIL and Grasim. The promoters are stated to have *de jure* negative control and *de facto* sole control over the combining parties. They have also submitted that the businesses have used a common branding, have worked closely and shared a common management. However, it has not been mentioned since when such common branding etc. started. Obviously it was after the acquisition of the relevant division of Kanoria Chemicals in 2011. Let us look at each of these claims in brief:

- **Shareholding:** As proposed by the combining parties the said promoters are: (a) immediate family members of Mr. Kumar Mangalam Birla; and (b) companies/enterprises ultimately controlled by the said family members. Promoters and through cross shareholding hold 25.45 % in Grasim and 34.59 % in Hindalco. HINDALCO in turn directly and indirectly holds 54.64 % shares in ABCIL. However neither HINDALCO nor GRASIM is held with majority shareholding by the Promoters. The promoters include natural persons and juridical persons. It has also been brought to the notice of the Commission that none of the individual shareholders (other than the promoters together) hold more than 10 per cent of the shares individually/as a separate entity.
- **Common customers:** Combining parties have submitted that in two of the sensitive overlapping products viz SBP and PAC, there are just 10 common customers out of a total of 430 customers and six common customers out of 359 common customers respectively for the year 2013-14. This argument could work both ways in that in case of coordination by the said entities such a scenario could arise, which, in fact, could be scrutinized under section 3(3)(b) of the Act, viz. market sharing by competitors. Therefore, this cannot be used as an absolute argument for 'single economic entity'. Thus while the parties have argued that even though they are distinct legal entities they are *de facto* part of a 'single economic entity', it is noticed that amongst their top 5 customers, two are common, which are major public sector units/government undertakings.

<sup>11</sup> American Needle, Inc. v. National Football League, 560 U.S. 183 (2010) at page 2 par (c).

<sup>12</sup> In Case C-97/08 Akzo Nobel NV and Others v Commission.



- **Competition between parties:** It has been informed that the customers of the combining parties are dispersed across the country and are not concentrated in any one particular region, and as stated by the parties, ABCIL and Grasim were not competing for the common customers. It is not fully established that the parties were not competing prior to the proposal for combination given that the parties compete in government sales. The parties submitted that in case of government sales there are 2 customers common to the parties: major public sector units/government undertakings.
45. Two issues arise: (i) whether, given the clarity in the provision in section 2(h) of the Act regarding economic entity in Competition Act, 2002, is it necessary to subject entities that claim to be part of the same economic entity, with over 50 per cent shareholding by a common shareholder or group of shareholders, to the ‘rule of reason’ test; (ii) When the shareholding of such entities by the common shareholder is below the 50 per cent mark, is it necessary to subject such cases to the test of ‘rule of reason’ for *de facto* control by the common holding company. The best possible guide to look for in this regard normally is cases decided by the Commission and the Competition Appellate Tribunal (COMPAT). In two cases the issue of ‘single economic entity’ was decided by the Commission. In *Exclusive Motors Private Ltd v. Automobili Lamborghini*, Case No. 52 of 2012, even though the Informant argued that the as per the Opposite Parties, Volkswagen India was not a subsidiary of the Automobili Lamborghini S.P.A. and that it was a separate legal entity owned by Volkswagen Group, the Commission held that “this does not help the Informant’s case in any manner whatsoever”. It was held by the Commission that “As long as the opposite party and Volkswagen India are part of the same group, they will be considered as single economic entity for the purpose of the Act.” Commission was not explicit about the definition of ‘group’ relied on for this purpose. However the Hon’ble COMPAT in the Appeal No. 1 of 2013 analyzed in detail the relationship between Automobili Lamborghini S.p.A. and Volkswagen Group Sales India Pvt. Ltd., both being held to the extent of almost 100 per cent by the common parent company Volkswagen AG (99.9 % and 99.55 % respectively). COMPAT presumed influence of the parent on the two subsidiaries to concur with the conclusion of the Commission that both the companies belonged to the same ‘single economic entity’. No ‘rule of reason’ analysis was done. In that sense this decision by the Commission and by the COMPAT does not provide guidance for the case under consideration, because the facts of the case are very different, with no one natural or juridical person or group of natural or juridical persons having shareholding of over 50 per cent in the combining enterprises in the present case.
46. The second case where the issue of ‘single economic entity’ was raised before the Commission was *Suo Moto* Case No. 02 of 2014, where, in a case of alleged cartelization, the Opposite Parties (four public sector insurance companies) pleaded that



the Government of India holds 100 per cent shares of each of the OPs and that the management and affairs of OPs are controlled by the Government of India through the Department of Financial Services (Insurance Division), Ministry of Finance. The Commission, however, noted that:

*“....although the public sector insurance companies are presently under the overall supervision of the Central Government, each of the OPs placed a separate bid in response to the tenders issued by the Government of Kerala for implementation of RSBY/CHIS schemes. Further, parties themselves have admitted to the DG that all decisions relating to submission of bids, determination of bid amounts, business sharing arrangements, etc. were taken internally at company level without any ex ante approval /directions from Ministry of Finance. Even the decisions taken by the companies were not notified ex post to the Ministry. Thus, it is apparent that the OPs participated in the impugned tenders independent of Ministry of Finance and the DG also did not come across any contra evidence.”*

*“....tenders ..... were based on their own volition and the Ministry of Finance had no role to play. On this basis, the Commission holds that the Ministry of Finance did not exercise any de facto or de jure control over OPs’ business decisions in submitting bids for impugned tenders. As such OPs cannot be said to constitute a single economic unit”*

47. However, the above mentioned *suo moto* case also does not give any guidance for the case under consideration, as in this case the extent of shareholding of the Government of India is 100 per cent in each of the Opposite Parties (OPs) and through the application of ‘*rule of reason*’ it was held that for the economic conduct of ‘collusive bidding’ under investigation the OPs were not forming part of a single economic entity. In the market they manifested themselves as competitors by bidding separately. Under the provisions of the Insurance Regulatory and Development Authority Act, 1999 they had the possibility to bid jointly in a legitimate manner. However, they decided to bid separately and share the market subsequently, thus acting in an anti-competitive market and distorting the market working.
48. I am, therefore, of the view that since the Indian law is specific as regards definition of economic entity defined as ‘enterprise’, which could consist of subsidiaries as well, there is no need to subject cases where common shareholding is not above 50 per cent to the ‘*rule of reason*’ test , for determining ‘single economic entity’ status. They stand *per se* excluded.
49. However, even if ‘*rule of reason*’ test is applied to the present case of combining parties I am not able to conclude that they form a ‘single economic entity’ for



competition analysis purposes. I shall elaborate. In a ‘*rule of reason*’ analysis ordinarily at least the following factors need to be considered before arriving at a decision: (i) the extent of shareholding of the parent in each of the combining parties; (ii) whether the parent has control over the board of directors, (iii) whether the parent and the subsidiaries have been consistently representing themselves as part of the ‘single economic entity’ for other regulatory compliances; (iv) the extent to which the parent had a share in the profits of the subsidiary; (v) whether the combining parties have been presenting themselves as one entity to the customers and competitors, (vi) whether they had a unity of control as regards marketing and procurement, (vii) how long has such unity of purpose been in existence and has it been consistent.

50. An evaluation of the present case based on the above criteria shows that:

- i. There is no majority shareholding in any of the two combining parties by any single natural or juridical person or group thereof.
- ii. As regards Board of Directors, only 2 Directors are common between Grasim and Hindalco. There is no common Director in ABCIL. This while here are 10 Directors in GRASIM, 12 Directors in HINDALCO and 8 Directors in ABCIL. The parties have submitted that given the shareholding pattern of both the combining parties and the parent, with minority holding the ability to have power to ‘minority blocking’ with shareholding equal to or above 26 per cent exists. The fact, however, remains that the power of ‘minority blocking’ cannot be the basis for drawing conclusion regarding ‘single economic entity’, involving control of a substantial nature with crucial implications for competition in the market.
- iii. It is also not clear if they present themselves as one single entity for other regulatory compliances.
- iv. No information regarding details of the share in the profits of the combining parties by the parent is available;
- v. The parent and subsidiaries have not been consistently presenting themselves as one entity. Reference to either company by others in the Annual Reports could not be noticed.
- vi. The two combining parties have been bidding separately as competitors;
- vii. The combining parties have indicated that they have a common procurement and marketing team.
- viii. However, this common arrangement (as in vii above) started only in November, 2011. In fact the efforts at consolidation of the ‘chlor-alkali’



business started in 2011 with a circular dated 02-09-2011 issued in the name of the Aditya Birla Group. And the structure was to be applicable from 15<sup>th</sup> September 2011. This is much after the start of enforcement of section 5 and 6 of Competition Act, 2002, on 1<sup>st</sup> June, 2011.

51. The above analysis leads me to conclude that the combining parties do not form a 'single economic entity' for competition analysis purposes. Though such a unity has been evolving in recent years (i.e. since 2011 end) the conduct of the parties has not been consistent. Nor has the evolution been appearing to be consistent with the laws in force. I am, therefore, of the view that the proposal from the combining parties cannot have the benefit of exception from combination scrutiny based on the 'single economic entity' argument. This even as I feel there is no need to subject cases where shareholding is not above 50 per cent to the 'rule of reason' test since the Act is very explicit about the definition of 'enterprise' as a 'single economic entity'. Otherwise, it would become difficult, nay impossible, to distinguish between the 'unity of purpose' of a cartel and that of a 'single economic entity'.

### **Other Relevant Issues**

#### ***Recent acquisitions by ABCIL***

52. Chemical industry, in general, is a highly concentrated industry with high entry barriers due to its not so environmental friendly nature. That being the case the efforts of one of the largest players in the area and one of the combining parties *viz* ABCIL to get into an acquisition mode in recent times is relevant. The following acquisitions have come to my notice which are relevant:
- (a) ABCIL acquired the 'chlor alkali' division of Kanoria Chemicals in 2011 and has been manufacturing PAC only since the completion of this acquisition. In their response the Parties have informed that amongst the overlapping products manufactured by both the Parties, ABCIL was not present in the market of manufacturing SBP, PAC and CPW until very recently (read 'before acquisition of Kanoria Chemicals').
  - (b) It is also reported that the ABCIL in May, 2013 approved the acquisition of the Chlor-Alkali & Phosphoric Acid Division ("CA &P Division") of Solaris Chemtech Industries Limited ("SCIL").
  - (c) ABCIL is also reported to have acquired, as recently as in September, 2015, (when the proposal under consideration was still under process in the Commission) the 'chlor-alkali' division of Jayshree Chemicals Ltd, including the Caustic Soda Manufacturing Unit at Ganjam (Odisha).



53. Against the backdrops of such major acquisitions in the recent past in the ‘chlor-alkali’ sector by one of the combining parties a closer look at the proposal for combination is warranted.
54. Another aspect that needs to be looked at carefully is the fact that the combining parties are under investigation as regards their involvement in a collusive behavior. In this context it is pertinent to refer to the decision in a combination case in South Africa similar to the one at hand, regarding the merger between Life Healthcare Group (Pty) Ltd which is the acquiring firm and Joint Medical Holdings Ltd which is the target firm. The Competition Tribunal of South Africa emphasized an important principle of law that:

*“if two competitors had colluded on pricing and then sought to merge they could not rely on that prior collusion to argue that the merger would make no difference to pricing post-merger because the counterfactual is a market in which they did not compete. This would be contrary to a precept of public policy that firms cannot benefit from their unlawful conduct”<sup>13</sup>.*

*“The merging parties cannot rely on a past history of joint pricing to create a counterfactual that the merger would make no difference to pricing post-merger, because they had priced jointly before it”. “The correct approach to a counterfactual must be to compare what behaviour by firms would have been lawful competition between them pre-merger, with the post-merger scenario. It is not permissible to use unlawful competition as the yardstick of measurement”<sup>14</sup>.*

55. The above statement was made despite the fact that Life was holding 49.4% of stake in JMH. In the present case the stake is not so close to 50%. Based on the finding in para 28 above, I concur with the view of the Competition Tribunal of South Africa that the correct approach must be to compare the scenario if the combining parties were behaving in a legal way and not the *de facto* conduct of theirs, since they are not having over 50 per cent shareholding by common shareholders. Thus based on the foregoing analysis and conclusion that the combining parties do not form part of a ‘single economic entity’ they should be treated as separate enterprises for combination analysis.
56. I feel it important to record my dissent to the majority order because the decision on this case will have important implications for future decisions by the Commission. It will set a precedent. Even though the majority decision is without prejudice to any

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<sup>13</sup> Para 42 of Case No: 74/LM/Sep11 013235, Competition Tribunal of South Africa

<sup>14</sup> Para 59, 60 of Case No: 74/LM/Sep11 013235, Competition Tribunal of South Africa



ongoing or future enquiry/investigation under the relevant provisions of the Act, in respect of the Parties, the *ratio* of this decision will have implications for the outcome in such matters. Commission's mandate is to ensure that practices having adverse effect on competition are eliminated. Agreements among competitors have always been the most pernicious of all violations of competition law, and traditionally the most stringent penalties are reserved for such anticompetitive agreements. However, when such efforts by the competition authorities were frustrated by entities/enterprises by entering into 'merger' arrangement, the mature jurisdictions devised the system of 'merger regulation' to prevent circumvention of provisions related to anti-competitive horizontal agreements, in particular. Thus in our country the Competition Act, 2002 also covered regulation of combinations as an integral part of the national competition law framework. In case every set of entities with common shareholding or having *de facto* control by a common entity is exempted from scrutiny for *appreciable adverse effect on competition* in markets, there will be a trend to form companies with minority shareholding and coordinate the activities of such companies to escape anti-trust action on *de facto* basis. Any combination of such entities also would escape anti-trust action. This is why the Act in section 2(h) of the Act defines 'enterprise' as the object of the law, with a broad definition of the enterprises to comprise of 'units' 'divisions' and 'subsidiaries'. Holding company and subsidiaries form part of a 'single economic entity' and cannot be accused of concerted practice, unless it is proved that the 'holding company/entity/natural person(s) in reality is not exercising control over market decisions of the subsidiary. Here '*rule of reason*' analysis become relevant. Competition Act, 2002 defines 'enterprise' specifically. The concept of 'group' as provided in Explanation to section 5 of the Act is explicitly stated in that section to be applicable for that section. And it is meant only for specifying the threshold level for combination notification. This cannot be interpreted so as to define 'single economic entity' (as discussed in paras 17-23 above)

57. When there is 100 per cent shareholding in the subsidiary by the holding company, there is presumption of 'control' over the market related decision making of the subsidiary by the parent. However, even when 100 per cent ownership is by the parent company, the parent company may not necessarily have influence over the subsidiary for day to day business decisions. Therefore, '*rule of reason*' test is applied for evaluation of effective influence over decision in the market. The burden of proof is on the Commission when section 3 or section 4 of the Act are involved as this involves decision on penalty. When it is a section 5-6 case it is for the party to prove that they belong to a 'single economic unit', with the holding entity(ies)/person(s) exercising determining influence in day to day market decision making of the 'subsidiary'. This is the practice in mature jurisdictions. Our law has drawn from and en-capsuled the evolution of many years of the concept of 'single economic entity' in major jurisdictions and provides for exemption from mandatory notification under section



6(2) of the Act when the combining parties are part of a single ‘enterprise’, as defined in section 2(h) of the Act.

58. In the instant case the common shareholders are a number of natural and juridical persons, each having minimal shareholding, and together having much less than majority shareholding in the combining parties, as discussed in para 39. Therefore, they do not qualify for special treatment in the procedures for merger review envisaged in the Act, especially under section 29 of the Act. Even as I hold that the ‘*rule of reason*’ test for ‘single economic entity’ need not be applied to any combination involving parties held to the tune of less than 50 per cent by common shareholders, it has still been clearly shown in para 48 and 49 that even if such test is applied to the combining parties, the combining parties do not qualify as ‘single economic entity.’
59. Given that there in overlapping products like PAC and SBP where the market shares of the combining parties are high with abnormally high incremental HHI post combination as discussed in para 14(c) and analysis in para 14 (a) to (k), in general, indicating *prima facie* ‘appreciable adverse effect on competition’ in the relevant market; given the tendency of one of the combining parties to aggressively pursue acquisition of competitors; and given that the ‘single economic entity’ exemption is not available to the parties as found above, it is felt appropriate to take the proposal to stage two of merger review process as envisaged in section 29 of the Act, to enlist the views of other stakeholders, especially the consumers and other players in the market, based on which a considered decision can be taken by the Commission with reference to provisions of 20(4) of the Act.
60. It is ordered accordingly.