



12.03.2018

**Notice given under Section 6(2) of the Competition Act, 2002 by
UltraTech Cement Limited: Combination Regn. No. C-2015/02/246**

CORAM:

Mr. Devender Kumar Sikri
Chairperson

Mr. Sudhir Mital
Member

Mr. Augustine Peter
Member

Mr. U. C. Nahta
Member

Mr. G. P. Mittal
Member

Appearances during Oral hearing on 03.10.2017 for UltraTech Cement Limited:

Mr. Somasekhar Sundaresan, Advocate, Ms Nisha Kaur Uberoi, Advocate, Ms Soumya Hariharan, Advocate, Ms Atreyee Sarkar, Advocate, Ms Ankita Gulati, Advocate, Mr. Paresh Thakker, General Counsel, UltraTech, Mr. Subodh Sista, Legal Manager – M&A, UltraTech

Order under Section 43A of the Competition Act, 2002

A. Background

1. On 17.02.2015, the Competition Commission of India (hereinafter referred to as the “Commission”) received a notice (“Notice”), under Section 6(2) of the Competition Act,



2002 (“**Act**”), filed by UltraTech Cement Limited (“**UltraTech**”/ “**Acquirer**”). The notice of combination was given pursuant to execution of an Implementation Agreement between UltraTech and Jaiprakash Associates Limited (“**JAL**”/ “**Seller**”) on 23.01.2015 (“**IA**”) (hereinafter UltraTech and JAL are collectively referred to as the “**Parties**”). The combination related to transfer of business, assets and operations of two cement plants (including captive power plants), located at Bela and Sidhi in Madhya Pradesh (“**Target Assets**”), owned by JAL, to UltraTech, on a going concern and slump exchange basis, through a scheme of arrangement under Section 391 to Section 394 of the erstwhile Companies Act, 1956 (“**Combination**”). On 10.04.2015, the Commission approved the Combination by passing an order under Section 31(1) of the Act (“**Order**”). However, the Order was passed without prejudice to any proceedings under Section 43A of the Act.

B. Initiation of proceedings under Section 43A of the Act

2. In terms of Section 6(2) of the Act, an enterprise, which proposes to enter into a combination, is required to give a notice to the Commission, disclosing the details of the proposed combination, within thirty days of the execution of any agreement or other document for acquisition. Further, as per Section 6(2A) of the Act, no combination shall come into effect until 210 days have passed from the day on which the notice has been given to the Commission under Section 6(2) or the Commission has passed order under Section 31 of the Act, whichever is earlier.
3. During the review of the Combination, the Commission noted that the Acquirer had provided a corporate guarantee to Axis Bank Limited (“**Axis Bank**”) in favour of JAL based on which Axis Bank had advanced a loan of INR 500 Crores to JAL. Considering the minutes of the meeting of Board of Directors of UltraTech (“**Board**”) held on 23.12.2014 (“**First Meeting**”) and the conditions contained in Memorandum of Understanding executed between the Parties on 23.12.2014 (“**MOU**”), the Commission formed an opinion that extension of the aforesaid loan has the effect of consummating a part of the Combination without the approval of the Commission and therefore, UltraTech



has failed to give notice in accordance with Section 6(2) of the Act. Accordingly, a show cause notice was issued to UltraTech on 23.04.2015 under Section 43A of the Act read with Regulation 48 of the Competition Commission of India (General) Regulations, 2009 (“**General Regulations**”) (“**SCN**”). The SCN required the Acquirer to show cause, in writing, within 15 days of receipt of the same, as to why penalty, in terms of Section 43A of the Act, should not be imposed on it for failure to file notice of the Combination in accordance with Section 6(2) of the Act. The Acquirer filed its reply to the SCN on 22.05.2015 (“**Response to SCN**”) along with a request for oral hearing, in terms of Regulation 48 of the General Regulations.

4. In its meeting held on 25.08.2017, the Commission considered the Response to SCN and decided to grant an oral hearing to the Acquirer. Accordingly, the Acquirer presented its case before the Commission on 03.10.2017 and also made written submissions on the same date.

C. Submissions of the Acquirer

5. In the Response to SCN and during oral submissions, UltraTech contended the following:

Sequence of events leading to filing of the Notice

- 5.1 That the Board of UltraTech initially evaluated the transaction forming subject matter of the Combination in the First Meeting and pursuant to the same, the Board granted preliminary approval for the transaction, subject to due diligence. The approval of the Board was limited to execution of the MOU.
- 5.2 Pursuant to the First Meeting, the Parties entered into the MOU which merely demonstrated the Parties’ intention to enter into the Combination and the same was valid only until the execution of definitive agreements. As is customary in large proposed transactions, the MOU also contemplated a period of exclusivity in



preference to or in substitution of the Combination. The Parties proposed to enter into a binding definitive agreement within four weeks from the MOU, subject to due diligence.

- 5.3 JAL had a total debt of approximately INR 28,000 Crores on its books as on 31.03.2014. In light of its distressed financial position, JAL approached Axis Bank for availing financial assistance by way of a short term loan. In this regard, JAL and Axis Bank executed a short term credit facility agreement on 24.12.2014 by way of which Axis Bank agreed to advance a credit facility of INR 500 Crores to JAL for a period of nine months (“**Short Term Loan**”). The Parties had successfully concluded one transaction in the past where the Acquirer had acquired cement assets in Gujarat from the wholly owned subsidiary of JAL. On JAL’s request, the Acquirer provided a corporate guarantee to Axis Bank and executed a deed of guarantee on 24.12.2014 in favour of Axis Bank in relation to the Short Term Loan.
- 5.4 Subsequently, on 23.01.2015, the Board considered and granted its final approval to the transaction (“**Second Meeting**”), including the draft scheme to be presented before a court for sanction which was, *inter alia*, subject to approval of the Commission, demonstrating clear intent of the Acquirer to comply with all applicable laws. As a result of due diligence findings, the Board was also informed that the consideration for the Combination was reduced from INR 5,400 Crores (as mentioned in the MOU) to INR 5,325 Crores.
- 5.5 Pursuant to the Second Meeting, the Parties entered into the IA which set out the definitive manner of effecting the Combination, based on which the Acquirer filed the Notice.

The MOU did not constitute the trigger for notification under the Act



- 5.6 That the trigger document for the purpose of notifying the Combination to the Commission was the IA, being the binding agreement detailing the Acquirer's commitment to acquire the assets and the manner in which such acquisition was to be made and not the MOU. The Acquirer made elaborate submissions as to why signing of the MOU cannot be considered as a trigger event and how there is no failure on the part of the Acquirer to file notice under Section 6(2) of the Act.

Section 43A empowers the Commission to impose penalty only in case of failure to file notice under Section 6(2) of the Act and not for gun jumping

- 5.7 Section 6(2A) of the Act provides that “**no combination shall come into effect**” until 210 days have passed from the date of filing of notice under Section 6(2) of the Act or until the combination is approved by the Commission. Section 43A of the Act empowers the Commission to impose penalty only in case of failure to give notice under Section 6(2) of the Act and not for gun jumping (in violation of Section 6(2A) of the Act).

The extension of corporate guarantee did not lead to part consummation of the Combination

- 5.8 That the hold separate rules which prevent parties from implementing a proposed transaction apply after the execution of binding documents until the approval of the transaction by competition authorities. The arrangement in question, *i.e.*, the Short Term Loan, did not occur between the signing of definitive documents in relation to the Combination and approval of the same by the Commission. Any conclusion that the arrangement resulted in consummation of the Combination would be anomalous since there was no possibility of any definitive agreement between the Parties in relation to the Combination given that the Board only approved the Acquirer proposing to acquire Target Assets on 23.01.2015.



- 5.9 While the MOU lapsed on 23.01.2015 and the Acquirer or JAL would have had the option to walk out of any further negotiations, the obligation of the Acquirer to step-in in the event of default by JAL to repay the Short Term Loan or the obligation of JAL to repay the same was not conditional on due diligence findings and did not cease on 23.01.2015. The loan amount was repayable irrespective of the Combination.
- 5.10 The Parties did not violate the standstill obligations under the Act given that they did not take any steps that brought or resulted in the Combination coming into 'effect' prior to its approval by the Commission as the Acquirer exercised no control over the Target Assets by virtue of the provision of corporate guarantee against the Short Term Loan.
- 5.11 As per the IA, the closing of the Combination was subject to several conditions precedent including the approval of the Combination by the Commission. Pursuant to the IA, the Parties have maintained *status quo* in relation to Target Assets and there has been no acquisition of control by the Acquirer, *de jure* or *de facto*. As on the date of approval of the Combination by the Commission, the Combination was still subject to the approval of the shareholders of the Acquirer and other regulatory approvals and the Target Assets continued to be managed by JAL and the Acquirer had no control over the same.
- 5.12 The provision of corporate guarantee by the Acquirer to Axis Bank in relation to the Short Term Loan:
- (a) did not provide the Acquirer any Board seat or veto rights or any ability to control the operations of the Target Assets;
 - (b) did not give the Acquirer the power to determine the commercial behaviour of the Target Assets;
 - (c) did not impede the Parties' ability to act as independent competitors;



- (d) did not grant any access, to the Acquirer, of the Target's competitively sensitive information;
- (e) did not provide the Acquirer any right to get interim profits of the Target Assets;
- (f) did not provide the Acquirer any right to dispose of the Target Assets;
- (g) neither compromised the Combination nor was inter-connected or inter-dependent on the Combination; and
- (h) did not affect the competitive landscape in any manner or affect the Commission's ability to prevent the Combination from occurring.

The Act does not restrict part consummation

5.13 The Act, devoid of other anti-competitive facts, does not restrict part consummation of a combination in any manner. Section 6(2A) of the Act only provides that "No combination shall come into **effect**". Thus, there is no breach committed by making loan arrangement even assuming without admitting that it amounts to part consummation of the Combination given that the Combination did not come into effect before the expiry of timeline contained in Section 6(2A) of the Act.

D. Analysis and Findings of the Commission

6. The Commission has noted the submissions of the Acquirer regarding compliance of Section 6(2) of the Act by virtue of filing the Notice within 30 days of execution of the IA and regarding Section 43A of the Act empowering the Commission to impose penalty only in cases of failure to file notice under Section 6(2) of the Act and not for gun jumping (in violation of Section 6(2A) of the Act). The Acquirer is of the opinion that compliance with Section 6(2) of the Act only entails filing of notice relating to a combination within 30



COMPETITION COMMISSION OF INDIA
(Combination Registration No. C-2015/02/246)



Fair Competition
For Greater Good

days of trigger event and accordingly the obligation of the parties in this regard stands discharged with the filing of notice within the timeline prescribed. As regards scope of Section 6(2A) of the Act, the Acquirer is of the opinion that there is no penal provision for imposition of penalty for instances of gun jumping and the Act only envisages penalty for failure to file notice under Section 6(2) of the Act.

7. The Commission is of the opinion that the submissions of the Acquirer are misplaced and not tenable. Gun jumping implies any action pursuant to the proposed combination which has the effect of consummating the combination or any part thereof without approval, express or implied, from the Commission. The substantive issue involved is that of the conduct of the parties to a combination and not only that of timing of conduct. Going by the arguments of the Acquirer, it would imply that parties, during the stage of negotiations, may enter into cooperation on any commercial/financial/marketing aspects leading to integration of their operations and yet claim that the conduct cannot amount to gun jumping, as it occurred prior to the execution of definitive agreements or filing of notice. Hence, what is critical in such cases is determination of the fact whether the alleged conduct is pursuant to the combination and has the effect of consummating a part of a combination and not the timing of the same. Also, if the Acquirer's submissions on Section 6(2) and 6(2A) of the Act that the parties to a combination are free to consummate a combination or any part thereof before giving notice or after giving notice but without waiting for the expiry of period specified under Section 6(2A) of the Act as long as notice is filed within the time limit prescribed under Section 6(2) of the Act were to be accepted, it would create anomaly and be against the principles of *ex-ante* review process of combinations.
8. After observing that the Acquirer's views on Section 6(2) and 6(2A) of the Act are not tenable, it would be appropriate to lay down the basic contours of gun-jumping which are consistent with the provisions of the Act. The Commission, *vide* its order dated 08.03.2016 passed under Section 43A of the Act in Baxalta Incorporated C-2015-07-297, considered the relationship between Section 6(2) and 6(2A) of the Act and held 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.**” (emphasis added)*

This view has been held by the Commission in other cases as well.

9. Further, the erstwhile Hon’ble Competition Appellate Tribunal (“**CompAT**”), while adjudicating the issue relating to *ex-ante* nature of notification in the case of SCM Soilfert Limited and Others v. Competition Commission of India, (2016) Comp. L.R. 1111 (“**SCM Case**”), observed that:

“The ex-ante nature of notification under Section 6(2) is buttressed by a reading of sec. 6(2A) which deliberately used the phrase “no combination shall come into effect” until 210 days from date of notice, or passing of order under Sec. 31.”

10. Based on the aforesaid observations of the Commission in the case of Baxalta Incorporated and of the erstwhile Hon’ble CompAT in the SCM Case, it is amply clear that a combined reading of the standstill obligations of the parties to a combination, as envisaged under Section 6(2) and 6(2A) of the Act, are considered as the cornerstone of *ex-ante* combination review process. While Section 6(2), by emphasising the words “proposes” or “proposed”, highlights that the parties cannot take any step towards consummation of the combination or any part thereof during the period leading to filing of notice, Section 6(2A) makes it mandatory that the parties observe standstill obligations during the review period



as well, as prescribed in the Act. A harmonious reading of Section 6(2) and Section 6(2A) brings out the continuity of standstill obligations as regards any combination transaction and implies that consummating the combination or any part thereof, before filing notice or after filing notice but before the expiry of period specified under Section 6(2A) of the Act, will be in contravention of Section 6(2) of the Act and violate the *ex-ante* nature of regulation of combinations in India.

11. In this backdrop, the Commission proceeds to determine the specific issues relating to the present matter.
12. The Acquirer has emphasised the fact that the IA was the valid trigger document and by filing notice within 30 days of execution of the IA, it has complied with the requirements of Section 6(2) of the Act. The Commission observes that submissions of the Acquirer in this regard are not relevant to the proceedings and completely misplaced. The SCN issued to the Acquirer does not envisage considering MOU as a trigger. The substance of the SCN is that the extension of corporate guarantee by the Acquirer in favour of JAL to Axis Bank and disbursement of loan by Axis Bank to JAL before filing of notice (regardless of what could have been considered as trigger document) had the effect of the Parties consummating a part of the Combination without the approval of the Commission **considering that the said arrangement was pursuant to the Combination.** Thus, what is relevant to the proceedings initiated against the Acquirer is the fact whether the said arrangement relating to Short Term Loan was pursuant to the Combination and not the determination of what constitutes a valid trigger document and timing of filing of notice. Accordingly, the submissions of the Acquirer in this regard are not considered as relevant to the present proceedings.
13. The Commission has considered various submissions of the Acquirer that the provision of corporate guarantee did not lead to consummation of a part of the Combination and observes as under:



- 13.1. The Acquirer has pointed out that, as the arrangement in question did not occur between the signing of definitive documents in relation to the Combination and approval by the Commission, the same cannot be considered to be in violation of Section 6(2A) of the Act. The Commission has already dealt with the issue of ‘timing’ of conduct above and in view of the same, the submissions of the Acquirer in this regard are rejected.
- 13.2. As regards the submissions of the Acquirer that the loan amount was repayable irrespective of the Combination, the Commission observes that the clause in the MOU whereby the Parties have agreed that the [...] indicates the intent of the Parties. Furthermore, even if the loan amount is repayable, the same does not mitigate violation of the standstill obligations. The key issue is that such an arrangement may result in the parties to the combination not acting independently as they are required to do till the combination is approved by a competition authority. In the event a transaction is not consummated and such arrangement is restored, the competition would have still been harmed in the interim time period. The Commission *vide* its order dated 14.09.2016, passed in Section 43A proceedings against Hindustan Colas Limited (“**Hindustan Colas case**”), had observed that distinction between refundable and non-refundable payments may not be relevant from the perspective of potential competition distortions.
- 13.3. The Commission also notes the submissions of the Acquirer that it has not gained any control over Target Assets by virtue of extension of corporate guarantee. It may be noted that pre-payment of consideration is considered significant as such an arrangement is potentially likely to facilitate tacit collusion which is considered to be the worst form of collusion and therefore cannot be allowed. The Commission had pointed out the potential adverse effect of such arrangements in the Hindustan Colas Case by observing:



“...pre-payment of price (whether refundable/non-refundable) may have a number of competition distorting effects viz., (i) it may lead to a strategic advantage for the Acquirer; (ii) it may reduce the incentive and will of ‘target’ to compete; and (iii) it may become a reason/basis to access the confidential information of the ‘target’. On an overall basis, it may be said that pre-payment of consideration may have the impact of creating a tacit collusion which may cause an adverse effect on competition even before consummation of the combination.”

- 13.4. In the same case, the Commission had also considered the argument that pre-payment of price has not resulted in any benefit or control to the acquirer and had observed that:

“The Act mandates the Commission to examine combinations ex-ante and therefore the issues such as whether the parties actually benefitted or not from the impugned conduct or whether there were any commercial exigencies behind a particular conduct may not be relevant to the determination of provisions of Section 6(2) and 6(2A) of the Act.”

Thus, considering the fact that such arrangements may facilitate tacit collusion and that there is no mechanism to ensure any safeguards in this regard, any finding on the aspects of actual acquisition of control/influence over the Target Assets or access to competitively sensitive information is not required.

- 13.5. The Acquirer has submitted that standstill obligations contained under Section 6(2A) imply that the combination should not come into ‘effect’ before the expiry of timeline contained in the Act or the approval of the Commission. The Acquirer has interpreted “coming into effect” as consummation of the combination or closing of the transaction and left out cases of part consummation. Accordingly, the Acquirer has made submissions to demonstrate that the Combination did not come into ‘effect’ before the approval by the Commission. In this regard, it is observed that the aim of standstill obligations is to ensure that the parties to the combination continue to compete as they were competing before the proposed combination. Further, the Commission observes



- that while there are many aspects of a combination transaction that may require parallel activities on the part of the parties to a combination, the objective of standstill obligations is to ensure that the parties remain as independent competitors as they were before the proposed transaction. Accordingly, all the activities/actions which may reduce or have the potential to reduce the degree of independence or the incentives of the parties to compete may be considered to be in contravention of Section 6(2A) of the Act. It is important to note that whether or not a particular conduct of the parties can be regarded as gun jumping in contravention of Section 6(2A) of the Act is a subject matter of examination as consummating a part of a combination may, in substance, have impact similar to consummation of the combination itself. In view of the aforesaid, the interpretation of the Acquirer as regards scope of Section 6(2A) of the Act is not tenable and the Commission is of the opinion that the observations regarding *ex-ante* notification requirement and standstill obligations apply both to consummation of a proposed combination or any part thereof.
14. Based on the aforesaid assessment, the Commission is of the opinion that the Acquirer has not addressed the core issues raised in the SCN regarding the extension of corporate guarantee being pursuant to the Combination and in substance constituting prepayment of consideration leading to consummation of a part of the Combination before the approval of the Commission. Therefore, the Commission proceeds to examine the issues of extension of corporate guarantee by UltraTech being pursuant to the Combination and constituting pre-payment of consideration.
 15. The Commission observes the sequence of events and terms and conditions of the MOU and notes that the Board had approved [...]. These discussions of the Board make it amply clear that UltraTech would not have granted this corporate guarantee had it not been for the sole purposes of the Combination. Similarly, examination of disbursement pattern of the Short Term Loan makes the fact of this arrangement being pursuant to the Combination more clear [...]. Thus, it is clear that the extension of corporate guarantee by UltraTech and disbursement of “loan” by Axis Bank was connected and inextricably linked to the



Combination, and therefore, extension of corporate guarantee by UltraTech does not seem to be an independent transaction but an integral part of the Combination.

16. After observing that the extension of corporate guarantee was not in ordinary course of business and in fact was pursuant to the Combination, the Commission notes the terms and conditions agreed by the Parties in the MOU as per which, [...]. This agreement brings out clearly that the corporate guarantee was, in substance, pre-payment of consideration. In this regard, the mere fact that UltraTech had not granted any advance or loan to JAL and arranged corporate guarantee also becomes inconsequential considering the minutes of the First Meeting. [...]. Accordingly, the decision to use the instrument of corporate guarantee was a tactical decision made by management of UltraTech.
17. Based on the examination of deliberations at the First Meeting of the Board, the timing of execution of Deed of Guarantee, the relevant clause in the MOU and the timing of disbursement of Short Term Loan by Axis Bank, the Commission is of the opinion that the extension of corporate guarantee of INR 500 Crores by UltraTech in favour of JAL amounts to pre-payment of consideration and consummating a part of the Combination before the approval of the same by the Commission and accordingly attracts penalty under Section 43A of the Act, which reads as under:

“If any person or enterprise who fails to give notice to the Commission under sub section(2) of section 6, the Commission shall impose on such person or enterprise a penalty which may extend to one percent of the total turnover or the assets, whichever is higher, of such a combination.”

18. In terms of Section 43A of the Act, the Commission can levy a maximum penalty of one per cent of the combined value of the worldwide turnover of the Parties. However, the Commission has sufficient discretion to consider the conduct of the Parties and the circumstances of the case to arrive at the appropriate amount of penalty. Accordingly, while determining the quantum of penalty, the Commission, apart from the size and scale of the Combination, considers the fact that the Acquirer had voluntarily filed the notice



COMPETITION COMMISSION OF INDIA
(Combination Registration No. C-2015/02/246)



*Fair Competition
For Greater Good*

with the Commission and that the Acquirer has cooperated fully with the Commission. In view of the foregoing, the Commission considers it appropriate to impose a nominal penalty of INR 10,00,000/- (INR Ten Lakhs only) on the Acquirer.

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.