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COMPETITION COMMISSION OF INDIA

(Combination Registration No.C-2017/05/508)

24.01.2018

Notice given by Akira Marketing Private Limited, Mama Catering Private Limited, Claridges Hospitality Private Limited and Azure Hospitality Private Limited

CORAM:

Mr. Devender Kumar Sikri

Chairperson

Mr. S. L. Bunker

Member

Mr. Sudhir Mital

Member

Mr. Augustine Peter

Member

Mr. U. C. Nahta

Member

Mr. G. P. Mittal

Member

Appearances during oral hearing on 24.01.2018:

Ms. Pallavi Shroff, Advocate

Ms. Aparna Mehra, Advocate

Ms. Supritha Prodaturi, Advocate



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Order under Section 43A of the Competition Act, 2002 (“Act”)

Background

1. On 12.05.2017, the Competition Commission of India (“**Commission**”) received a notice jointly filed by Akira Marketing Private Limited (“**Akira**”), Mama Catering Private Limited (“**Mama Catering**”), Claridges Hospitality Private Limited (“**Claridges**”) and Azure Hospitality Private Limited (“**Azure**”) under sub-section (2) of Section 6 of the Competition Act, 2002 (“**Act**”). (hereinafter, Azure, Mama Catering, Akira and Claridges are referred to as “**Parties**”). The notice was filed pursuant to a scheme of amalgamation approved by the respective Board of Directors of the Parties, by way of board resolutions, each dated 28.09.2016.
2. The combination envisaged merger of Claridges, Akira and Mama Catering with and into Azure, with Azure being the resultant entity. (“**Combination**”).
3. In its meeting held on 29.06.2017, the Commission considered and assessed the Combination and approved the same by passing an order under Section 31 (1) of the Act. The said order was passed without prejudice to any proceedings under Section 43A of the Act.

Proceedings under Section 43A

4. The Commission observed that in terms of sub-section (2) of Section 6 of the Act, the Parties ought to have filed notice within a period of 30 days of approval of the proposal relating to Combination by the respective Board of Directors of the Parties. However, Parties filed Notice only on 12.05.2017, after seeking a pre-filing consultation with the Commission.



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5. The Commission, accordingly, directed that a show cause notice be issued to the Parties under Regulation 48 of the Competition Commission of India (General) Regulations, 2009 (“**General Regulations**”), read with Section 43A of the Act. In accordance with the directions of the Commission, a show cause notice was issued to the Parties on 12.10.2017 (“**SCN**”) directing them to show cause, in writing, within 15 days of receipt of the SCN, as to why penalty, in terms of Section 43A of the Act, should not be imposed on them. The Parties filed their response on 30.10.2017, along with a request for oral hearing.
6. The Commission, in its meeting held on 21.12.2017, considered the matter and decided to grant an oral hearing to the Parties, as per their request. The Commission heard the authorized representatives of the Parties on 24.01.2018. The Commission notes that, *vide* written and oral submissions, the Parties have, *inter alia*, made the following submissions:
 - 6.1 That the Parties did not file a notification form with the Commission within 30 days of the board resolutions dated 28.09.2016 based on the *bona fide* belief that the transaction was not notifiable to the Commission for the following reasons:
 - (a) The Combination did not meet the thresholds specified in Section 5(c)(i) and Section 5(c) (ii) of the Act;
 - (b) Even if group thresholds are met, the Parties were of the view that the transaction was exempt under Item 9 Schedule I of the Competition Commission of India (Procedure in regard to the Transaction of Business relating to Combinations) Regulations, 2011 (“**Combination Regulations**”).
 - 6.2 That Parties, on their own volition, approached the Commission for a pre filing consultation, which was held on 24 April 2017 (“**PFC**”). It was during the PFC that the Parties became aware of the Commission’s opinion



that the transaction was notifiable. Upon becoming aware of the Commission's view, the Parties submitted a Form I notification within 15 working days of the PFC i.e. on 12.05.2017.

6.3 That the Ministry of Corporate Affairs, *vide* notification no. S.O. 988 (E) dated 27.03.2017, has clarified that the target exemption will be applicable to all forms of transactions i.e. acquisitions, as well as mergers and amalgamations, where the assets being acquired, taken control of, mergers and amalgamated are not more than INR 3.5 billion in India or where the turnover is not more than INR 10 billion in India. In view of the same, had the merger between the Parties been approved by the Boards of Directors of the Parties on or after 27.03.2017 (date of enforceability of revised target exemption), the transaction would have been exempt under the revised target exemption.

6.4 That Ministry of Corporate Affairs notification *vide* notification no. S.O. 2039(E) dated 29.06.2017 removed the obligation of filing notifications to the Commission for approval of transactions within 30 calendar days from the date of the trigger event.

7. In addition to above, the Parties have submitted that the Commission may consider the following mitigating factors:

7.1 *Voluntary filing:* That the Parties did not conceal the transaction and on their own volition approached the Commission for a PFC. On becoming aware of the Commission's view, the parties voluntarily submitted a notice within 15 working days of the PFC for seeking approval.

7.2 *The breach was technical in nature:* The Parties have stated that any non-compliance was only in regard of a delayed filing, which would only be of



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a technical or procedural nature as any technical failure of the Parties to notify the transaction arose from a different understanding of law.

7.3 The Parties had no intention to violate the pre-notification requirement:

The Parties have stated that they had no intention to violate the mandatory pre-notification requirement under the Act. The Parties have stated that they were under the *bona fide* belief that the transaction was not notifiable.

7.4 The transaction was not consummated until the approval of the Commission: The Parties have stated that the transaction was approved on 29.06.2017 and was consummated on 01.09.2017.

7.5 The transaction does not cause any AAEC in India: The Parties have submitted that the transaction did not lead to an AAEC in India.

7.6 Principle of Proportionality: The Parties have submitted that any penalty imposed by the Commission must be commensurate with the gravity of the misconduct and that in the present case, no penalty should be imposed on Parties in the light of facts and circumstances of the case and the principle of proportionality.

8. With respect to the written and oral submissions of the Parties as mentioned above, the Commission observed as under:

8.1 In terms of the legislation prevailing as on date of signing of the board resolutions (i.e. on 28.09.2016), the Parties ought to have filed the notice within a period of 30 days of the same i.e. by 27.10.2016. However, the Parties filed the notice only on 12.05.2017. Therefore, the Parties' act of belated filing is in contravention of provisions of Section 6(2) of the Act.

8.2 While it is correct that the Parties requested for a PFC and ultimately filed the notice, the option for seeking PFC was always open to the Parties and



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that they could have availed the PFC within the stipulated 30 day period or even prior to the date of board resolution.

8.3 Further, during the oral hearing on 24.01.2018, the Parties have admitted that there has been a delay in filing the notice.

9. In view of the foregoing, the Commission is of the considered view that the Parties have contravened the provisions Section 6 (2) read with Section 6 (2A) of the Act, which attracts penalty under Section 43A of the Act. Section 43A of the Act reads as under:

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

10. Accordingly, in terms of Section 43A of the Act, the Commission can levy a maximum penalty of one per cent of the higher of combined value of worldwide assets/turnover of the Parties i.e. INR 57,580.45 crores. However, the Commission has sufficient discretion to consider the conduct of the Parties and the circumstances of the case to arrive at an appropriate amount of penalty. The Commission considered the fact that the Parties had voluntarily filed the notice (before consummation) with the Commission and have subsequently admitted the delay in filing notice and sought lenient view and pleaded for no penalty. In view of the foregoing the Commission considered it appropriate to impose a nominal penalty of INR 1,00,000/- (INR One Lakh Only) on the Parties.

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



12. The Secretary is directed to communicate to the Parties accordingly.