



27.08.2018

**Notice given under Section 6(2) of the Competition Act, 2002 by
Bharti Airtel Limited: Combination Regn. No. C-2017/10/531**

CORAM:

Mr. Sudhir Mital
Chairperson

Mr. Augustine Peter
Member

Mr. U. C. Nahta
Member

Mr. G. P. Mittal
Member

Appearances during Oral hearing on 24.07.2018 for Bharti Airtel Limited:

Mr. Amit Sibal, Senior Advocate, Ms Aditi Gopalakrishnan, Advocate, Mr. Aakarsh Narula, Advocate, Mr. Nikhil Bahl, Advocate, Mr. Avinash Amarnath, Advocate, Mr. Sameer Chugh and Ms Nitya, Legal Counsels, Bharti Airtel Limited

Order under Section 43A of the Competition Act, 2002

A. Background

1. On 16.10.2017, the Competition Commission of India (“**Commission**”) received a notice under Section 6(2) of the Competition Act, 2002 (“**Act**”), given by Bharti Airtel Limited (“**Airtel**”) relating to proposed acquisition of 100 percent of the consumer mobile business run by Tata Teleservices Limited (“**TTSL**”) and Tata Teleservices (Maharashtra) Limited



(“TTML”) (“Tata CMB”) by Airtel (“Combination”/ “Transaction”). The notice was filed with the Commission pursuant to execution of a binding term sheet, by and between Airtel, TTSL, TTML and Tata Sons Limited on 12.10.2017 (“Acquisition Agreement”). On 16.11.2017, 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 Acquisition Agreement contained the following clause (“ER Clause”),

[...]

4. The Commission observed that *prima facie*, such a clause [...] may have the effect of the parties ceasing to act independently as the target would have no incentive to continue to compete as before. Further, [...] may allow the acquirer to influence the affairs of the target leading to a situation which is similar to tacit collusion.

5. Based on the aforesaid, the Commission formed a *prima facie* opinion that the ER Clause may have the impact of consummating a part of the Combination before the expiry of period specified under Section 6(2A) of the Act and by agreeing to the same, Airtel has failed to file notice in terms of Section 6(2) of the Act. Accordingly, a show cause notice was issued



to Airtel on 13.12.2017 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 Airtel 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 by consummating a part of the Combination before the expiry of period specified under Section 6(2A) of the Act. Airtel filed its reply to the SCN on 28.12.2017 (“**Response to SCN**”) along with a request for oral hearing, in terms of Regulation 48 of the General Regulations. Airtel also provided certain additional information/document(s) *vide* emails dated 18.04.2018 and 23.04.2018.

6. In its meeting held on 14.06.2018, the Commission considered the Response to SCN and decided to grant an oral hearing to Airtel on 04.07.2018. However, *vide* letter dated 29.06.2018, Airtel requested for adjournment in the matter. The Commission accepted the request of Airtel and granted a personal hearing on 24.07.2018. Accordingly, Airtel presented its case before the Commission on 24.07.2018. On the date of hearing, Airtel stated that the parties have entered into an Implementation Agreement to set out the manner of effecting the Transaction on 19.07.2018 and submitted an affidavit to explain its position in light of the Implementation Agreement. Further, the Commission also directed Airtel to provide certain information/document(s) in support of submissions made during the personal hearing. Airtel submitted such information/document(s) *vide* emails dated 07.08.2018 and 27.08.2018.

C. Submissions of Airtel

7. In the Response to SCN and during oral submissions, Airtel contended the following:

[...]

7.1 [...]



- 7.2 That typically, an appointed date or notional date [...] is introduced in transaction agreements to ensure that parties have a definitive basis for computation of liabilities or assets from a particular date; and the computation thereof is not affected by other factors which are beyond the control of the Parties – such as regulatory approvals etc. Notional dates [...], typically allow accounting adjustments on the date of closing; and the date from which such adjustments are computed, can itself not be considered the closing of a transaction unless and until the actual closing is achieved.
- 7.3 That the Transaction involves a number of regulatory approvals including *inter alia* approvals from the stock exchanges and approval of the National Company Law Tribunal (NCLT) and the Department of Telecommunications (DoT). Considering the said approvals, there is a fair bit of deal uncertainty. [...] If the parties do not receive the required regulatory approvals, [...] the ER Clause shall not come into effect.
- 7.4 That Clause 8 of the Acquisition Agreement subjected the entire Transaction to [...] the approval of the Commission (Regulatory Approval Clause). That since the ER Clause itself is part of the key transaction terms set out in Clause 3, it is necessarily required to be read with Clause 8 of the Term Sheet. The Regulatory Approval Clause clearly demonstrates that the Transaction, including the ER Clause was subject to the Commission's approval; and a contrary interpretation would not only be against the Parties' intention in the Acquisition Agreement, but also established interpretation standards of the Supreme Court.
- [...]
- 7.5 [...]. Airtel confirms that it has not taken any steps to give effect to the ER Clause until receiving the Commission's approval of the Transaction on 16.11.2017.
- 7.6 That consummation, by implication, implies taking such steps towards implementing a proposed transaction, as would have otherwise been taken subsequent to the approval.



That is in effect, Section 6(2A) prohibits actual actions aimed towards implementation of a transaction (such as payment of consideration; consummation of parts of an inter-connected transactions; consummating market-purchases inherently related to another notifiable transaction; depositing shares in an escrow account prior to the Commission's approval, etc.) and the Commission has never found a contractual arrangement prescribing a notional date, which itself becomes effective subsequent to the Commission's approval (or upon closing) as "giving effect" to a proposed combination.

- 7.7 That in this respect, the CADE Guidelines also has an indicative list of actions which could lead to consummation of a proposed transaction – such as a) transfer and/or usufruct of assets in general (including voting securities); b) exercise of voting right or relevant influence on the counterparty's activities (such as decisions regarding prices, customers, business/sales policy, planning, marketing strategies, interruption of investments, discontinuing of products and others); c) receipt of profits or other payments connected to the performance of the counterparty, etc.
- 7.8 That in view of the Commission's decisional practice (and international guidance), Airtel has not taken any steps towards implementation of the ER Clause – i.e. has not taken over control, exchanged any competitively sensitive information, paid consideration, [...] prior to receiving the Commission's approval of the Transaction.

Absent any consummation or "giving effect" to the ER Clause prior to the Commission's approval, there is no question of tacit collusion, or reduction in Tata CMB's incentive to compete

- 7.9 That the Commission has interpreted the effect of pre-approval integration in Hindustan Colas (Comb. Registration No. C-2015/08/299) in which the Commission indicated that pre-payment of price could distort competition by leading to a strategic advantage for the acquirer, reducing the incentive and will of 'target' to compete and becoming a basis to access the confidential information of the 'target' and the Commission found this to have the impact of creating a "tacit collusion" which could impede competition prior to



closing. That similarly, in Baxalta/ Baxter (Comb. Regn. No. C-2015/07/297), the Commission found that parties had ceased to behave independently in the market before receiving the Commission's approval. That even in other jurisdictions, the kinds of actions which are typically found to be in nature of premature integration and coordination are: acquisition of beneficial ownership; acquisition of operational control; sharing of competitively sensitive information on price, sales, etc.; exercise of voting rights; influencing the strategic decision making of the merging party contractually by virtue of clauses like non-compete, part payment of consideration, sharing of profits; interfering with the business of the other party by taking decisions on their behalf or influencing decisions over prices, consumers, customers, advertisement and marketing, business and sales policy; allocating customers/suppliers or development of joint strategies; appointment of directors on merging party's board; integration of sales force; actual transfer of shares or assets; interrupting investments or sales by being influenced by the other merging party; indulging into any conduct or activity which cannot be reversed at a later time.

- 7.10 Therefore, based on the Commission's practice and the standards followed by other antitrust jurisdictions -- a notional date [...], confers no strategic advantage on Airtel, does not reduce Tata CMB's incentive to complete, and does not form any basis to exchange confidential information prior to the Commission's approval. In addition, the ER Clause had no impact on Tata CMB's ability to compete effectively in the market.
- 7.11 That absent various regulatory approvals or due to the conditions of the Term Sheet not being met, there was a possibility that the Transaction may not be completed. In such case, Tata CMB's indulgence in any risk-taking action (due to any reduced incentives to compete) would have been detrimental to Tata CMB's interest. In such a scenario, Tata CMB would have compromised its own competitiveness in the market. That, as a matter of fact, there had been exchange of absolutely no competitively sensitive information or market intelligence between the Parties prior to receipt of the Commission's approval of the Transaction which could have facilitated coordination



between them. The Commission has also not relied on (or put Airtel to notice) with any evidence pertaining to this other than the ER Clause.

7.12 On the date of hearing, Airtel made reference to some of the terms of the Implementation Agreement as set out below:

- i. [...];
- ii. [...].

7.13 Based on the aforesaid, Airtel has stated that [...]

D. Analysis and Findings of the Commission

8. Before going into the examination of ER Clause for any violation of standstill obligations contained in Section 6(2A) of the Act read with Section 6(2) of the Act, it would be appropriate to understand the basic objective of standstill obligations contained in Section 6(2A) of the Act. The basic objective of standstill obligations contained in Section 6(2A) of the Act is to ensure that the parties to a combination transaction compete as they were competing before the initiation of combination process till the time the transaction is reviewed for any appreciable adverse effect on competition (“AAEC”) and approved by the Commission. In other words, the standstill obligations essentially require that the parties carry on with their ordinary course activities completely independent of each other and to the fact of the combination transaction. The rationale behind such obligations is that if the parties stop competing as they were competing before, the resulting adverse effect on competition in the interim period cannot be restored even if the Commission based on its review decides that the transaction is likely to result in AAEC and therefore does not approve the same or approve with modifications i.e., even if the transaction is not consummated or at least not consummated in the form as originally envisaged by the parties. Accordingly, the basis of examination of a gun jumping contravention is whether the parties have ceased to compete as they were competing earlier or whether they have ceased to act independently



as regards their ordinary course activities pursuant to the combination transaction. In this backdrop, the Commission examined the submissions of Airtel.

9. The Commission noted [...]. The observations of the Commission in this regard are as under.
10. The Commission agrees that a notional date may be indeed required to ensure certainty in respect of valuation of a business and that further to ensure that the value of business is preserved, the acquirer of a business may also be permitted to impose customary standstill and interim arrangements on the target. However, it is incumbent on the acquirer to ensure that the form and scope of the aforesaid customary arrangements imposed by it on the target is inherent and proportionate to the objective of ensuring certainty in business valuation and preservation of the same and that such conditions do not violate standstill obligations as envisaged in the Act. Thus, merely stating that [...] does not absolve Airtel of its obligations under the Act and thus the key question here is [...] whether the ER Clause potentially violates standstill obligations as envisaged in the Act. In other words, the ER Clause needs to be examined for its effects on competition dynamics and the question of the same being notional or otherwise is not relevant to the findings of gun-jumping. However, notwithstanding the same, based on the observations recorded in following paragraphs, the Commission is of the opinion that [...] was in fact not just a notional date.
11. The Commission examined the ER Clause (along with relevant clauses of the Implementation Agreement) and noted that:
 - (i) The ER Clause provided for [...];
 - (ii) Clause [...] of the Implementation Agreement, also referred to by Airtel, provides that,

“[...]”;



- (iii) Clause [...] of the Implementation Agreement, also referred to by Airtel provides that [...].
12. The Commission observed that as per Clause [...] of the Implementation Agreement, the Parties have agreed that [...]. This arrangement provides for a potential mechanism to exercise operational control on Tata CMB from the Agreed Date itself considering that cash is a flow variable which needs to be managed prospectively and cannot be managed retrospectively and any leakages etc. thereof during the interim period cannot be managed after consummation of the Combination. Thus, for all intent and purposes, the submissions of Airtel that [...] are contradictory to Clause [...] of the Implementation Agreement and the ER Clause seems to come into effect right on the [...] thereby implying that [...] was not akin to a “notional date” as claimed.
13. As regards the submissions of Airtel that the Regulatory Approval Clause demonstrates that the Transaction including the ER Clause was subject to the Commission’s approval, the Commission observed that the SCN does not allege consummation of the Transaction, it only alleges consummation of a part of Transaction which has to be examined independently of the consummation of the Transaction. The Commission in an order dated 12.03.2018 passed under Section 43A of the Act in Ultratech/JAL (Combination Regn. No. C-2015/02/246) observed that,
- “...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. Notwithstanding the aforesaid observations on [...] not being akin to a notional date, the Commission is of the opinion that even if [...] was actually akin to a notional date [...], the ER Clause would still be in contravention of standstill obligations contained in the Act for its likelihood of causing competition distortions as detailed in subsequent paragraphs.
15. The Commission, in its order dated 14.09.2016 in Combination Reg. No. C-2015/08/299 (*In Re: Hindustan Colas Private Limited*), passed under Section 43A of the Act, brought out some of the competition distorting effects which are significant for determining gun jumping. The Commission observed that,

“...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’.”

16. Combined reading of Clause [...] and [...] of the Implementation Agreement clearly bring out the lack of incentive of Tata CMB to compete with Airtel from [...] itself, i.e., before the Commission had approved the Combination. Clause [...] and [...] of the Implementation Agreement provide for an arrangement [...]. This type of arrangement, by its form itself, is bound to disincentive the target from competing as it was competing before execution of definitive agreement for the combination. Further, agreeing on [...] implies infringing with the ordinary course business activities of the target and cannot be considered as inherent and proportionate to the objective of preserving the business valuation. Considering that such date fell in a period prior to the approval of the Combination by the Commission, it amounts to contravention of standstill obligations as contained in Section 6(2A) of the Act.



COMPETITION COMMISSION OF INDIA
(Combination Registration No. C-2017/10/531)



*Fair Competition
For Greater Good*

17. Airtel in its submissions has given emphasis on relevance of “action” or “steps taken” for determining “giving effect” to a transaction or any part thereof. It has been stated that Section 6(2A) only prohibits actual actions aimed towards implementation of a transaction. In this regard, Airtel has made reference to the aforesaid decision of the Commission in Hindustan Colas giving emphasis on the “action” in that case i.e., pre-payment of price and to various “actions” typically found to be in nature of premature integration in other jurisdictions.
18. The Commission is of the opinion that Airtel has incorrectly interpreted the decision of the Commission in Hindustan Colas wherein pre-payment of consideration was held to be the tool of gun jumping which was examined for potential to cause competition distortions. The Commission is of the opinion that considering the substantive issue in gun jumping is the effect on competition dynamics, no distinction is required to be made between “actual actions” and “agreed contractual obligations” or any other arrangement that potentially affects competition dynamics and violate the standstill obligations. The issues of gun jumping are highly specific to the facts of the case and a broad generalisation as made by Airtel emphasising “action” is not correct.
19. The aforesaid view of the Commission is also consistent with the international guidance on the issue of gun jumping. While Airtel selectively pointed out to an indicative list of “actions” considered as potentially leading to gun jumping in CADE Guidelines to emphasise the importance of conduct, it missed the fact that the same CADE Guidelines also point to certain contractual provisions as connected to competitively sensitive activities and leading to premature integration of the activities of merging parties such as:
- a) no anteriority clause related to the term of effectiveness of the contract in relation to the date of its execution that brings any integration among parties; and
 - b) clauses allowing direct interference by any party in the other party's business strategies by submitting, for example, decisions over prices, customers, business/sales policy, planning, marketing strategies and other sensitive decisions (that do not constitute a



mere protection against deviation from the normal course of business and, consequently, the protection of the value of the business being sold).

20. The ER Clause is clearly in the nature of an anteriority clause as it envisages [...] from a date prior to the approval of the said Transaction by the Commission. Further, as detailed in Clause [...] of the Implementation Agreement, Airtel is allowed to [...] which implies Airtel's direct interference in ordinary course activities of Tata CMB. In this regard, when specifically asked to comment on the application of anteriority clause during the hearing, Airtel submitted that [...].
21. As stated above, the Commission while dealing with the distinction sought between refundable/non-refundable advance consideration in Hindustan Colas, focussed on the potential competition distortions to conclude that advance payment (whether refundable/non-refundable) may have competition distorting effects. The Commission noted in Hindustan Colas that,

“the distinction between refundable and non-refundable may have some merit in assessing the likelihood of reversion to the status quo ante in form, it may not be relevant from the perspective of potential competition distortions”

The view of the Commission was based on the fact that if the merger is not consummated and advance paid is indeed refunded, the fact of such payment may have already led to the two parties not acting independently and subsequent refund cannot restore the loss of competition in the interim period. Going by the same reasoning, the Commission is of the opinion that even if the submissions of Airtel that [...] are accepted, the same does not assuage the concerns of ER Clause leading to potential competition distortions. It may be noted that these findings of the Commission are strictly based on the scope of the ER Clause corroborated with the provisions of Implementation Agreement and not on concept of Appointed Date in general.



22. The aforesaid opinion of the Commission is also in sync with international decisional practices in this regard. In *United States of America v. Atlantic Richfield Company and Others* (Civil Action No. 910205, United States District Court for the District of Columbia), ARCO Chemical and Union Carbide Chemicals entered into an acquisition agreement on 27.09.1989 and under the terms of acquisition agreement, *inter alia*, ARCO Chemicals was required to cover liabilities from the continued operation of the Union Carbide Assets after 27.09.1989. By an adjustment mechanism in the acquisition agreement, the purchase price was to increase at closing if Union Carbide Chemicals incurred a negative net cash from Union Carbide Assets and would be decreased if Union Carbide Chemicals realized a positive net cash flow. The United States Federal Trade Commission filed a complaint alleging violation of standstill obligations contained in the Clayton Act, commonly known as the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (“**HSR Act**”) considering the aforesaid arrangement together with other arrangements had the effect, upon execution, of transferring beneficial ownership of the Union Carbide assets to ARCO Chemical so that ARCO Chemical and its parent, Atlantic Richfield Company, acquired those assets on 27.09.1989. The court held the same to be in violation of the HSR Act. [...]
23. Airtel has also submitted that the Transaction involved a number of regulatory approvals and considering the said approvals, there is a fair bit of deal uncertainty and due to the same, [...]. As stated above, the basic objective of standstill obligations is to maintain competition in the interim period. Accordingly, even if the Transaction was not to go through ultimately and the ER Clause did not come into effect, the same would be in contravention of standstill obligations for the potential adverse effect on competition caused in the interim period. Airtel has submitted that Tata CMB’s indulgence in any risk-taking action (due to any reduced incentives to compete) during the interim period would have been detrimental to Tata CMB’s interest. In this regard, the Commission observed that the exact incentives for entering into any agreement are best known to the parties and the Commission can only be guided by the nature/scope of agreement and information on record. Further, all the combination transactions have a number of conditions to be fulfilled before consummation which implies theoretically there is uncertainty in all the transactions. If a conclusion is drawn that such



uncertainty implies that the parties will not be incentivized to coordinate their behaviour in the interim period, it would mean and imply end of the very concept of gun jumping. The Parties have themselves agreed that certain steps such as pre-payment of consideration etc., can be considered as gun jumping. Even such cases are characterized by uncertainty of non-consummation and the only reason for considering such conduct as gun jumping is the likelihood of potential competition distortions and the same is equally applicable to the present case where a contractual obligation can be a source of potential competition distortions.

24. Based on the nature/scope of ER Clause read with Clause [...] and Clause [...] of the Implementation Agreement, the Commission is of the opinion that the ER Clause by itself amounts to consummating a part of the Combination before the approval of the same by the Commission and by agreeing to the same Airtel has failed to file notice for the Combination in accordance with Section 6(2) of the Act. Accordingly it 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.”

25. 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, in context of the Combination, while determining the quantum of penalty, the Commission considered the period over which the contravention continued (16 days since the Commission approved the Combination on 16.11.2018) as a mitigating factor. 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 Airtel.



COMPETITION COMMISSION OF INDIA
(Combination Registration No. C-2017/10/531)



*Fair Competition
For Greater Good*

26. Airtel shall pay the penalty within sixty (60) days from the date of receipt of this order.
27. The Secretary is directed to communicate to Airtel accordingly.