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## COMPETITION COMMISSION OF INDIA

(Combination Registration No. C-2015/01/241)

16.02.2016

### Order under Section 43A of the Competition Act, 2002 (“Act”) in relation to inquiry initiated under sub-section (1) of Section 20 of the Act against General Electric Company (“GE”), GE Industrial France SAS (“GEIF”) and GE Energy Europe B.V.

#### Introduction

1. The Competition Commission of India (“**Commission**”), in its meeting held on 20.10.2014, took *suo motu* cognizance of two public announcements (“**PAs**”) made by GE Energy Europe B.V., GE and GEIF (hereinafter, GE Energy Europe B.V., GE and GEIF are collectively referred to as the “**Acquirers**”) on 05.05.2014. The PAs were issued in terms of the relevant provisions of the Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (“**Takeover Regulations**”) for acquisition of up to 26 per cent of the total paid-up equity share capital of the Alstom India Limited (“**Target 1**”) and acquisition of up to 25 per cent of the total paid-up equity share capital of Alstom T&D India Limited (“**Target 2**”) from their respective public shareholders. Target 1 and Target 2 are hereinafter referred to as “**Targets**”.
2. It was observed from the PAs and a press release dated 26.06.2014 issued by Alstom S.A. that on 30.04.2014, GE made a binding offer to acquire the thermal power, renewable power and grid businesses of Alstom S.A. (the parent company of Target 1 and Target 2). As part of the transaction, GE would also indirectly acquire 68.56 per cent of equity share capital of Target 1 and up to 75 per cent of equity share capital of Target 2.
3. The Commission noted that GE together with Target 1 and Target 2 meet the thresholds specified in Section 5 of the Act and the aforementioned PAs fall within the purview of “*other document*” as contained in clause (b) of sub-section (2) of Section 6 of the Act read with sub-regulation (8) of Regulation 5 of the Competition Commission of India



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(Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (“**Combination Regulations**”), as applicable at the time of issuance of PAs. Accordingly, in terms of the above provisions, it appeared that *prima facie* the Acquirers were required to give a notice to the Commission under sub-section (2) of Section 6 of the Act regarding the proposed combination within thirty days of the PAs i.e., by 04.06.2014.

4. In view of the above, *vide* letter dated 28.10.2014, in terms of Regulation 8 of the Combination Regulations, the Acquirers were directed to notify the said transactions in Form II, within 30 days of the receipt of the communication in this regard.
5. On 24.11.2014, the Commission received a notice bearing registration no. C-2014/11/225 given by GE, GEIF, ALSTOM and ALSTOM Holdings (hereinafter GE, GEIF, ALSTOM, ALSTOM HOLDINGS are collectively referred to as “**Parties**”) in relation to the proposed combination comprising of (i) the acquisition of Alstom’s thermal power, renewable power and grid businesses by GE and its group companies (“**Primary Acquisition**”), (ii) the formation of joint ventures (JVs) i.e. the Grid and Digital Energy JV, the Renewables JV and the Global Nuclear and French Steam JV, between GE and Alstom in which Alstom will hold a minority shareholding, and (iii) the acquisition of the signalling business of GE by Alstom (“**Signalling Transaction**”). It was also submitted that the Parties reserve their right to file separate submissions in response to the issues raised in the letter of the Commission dated 28.10.2014.
6. For the purpose of the proposed combination, the parties to the combination entered into the (i) Master Agreement with respect to the Primary Acquisition, (ii) Formation Agreement with respect to the Grid and Digital Energy JV, (iii) Formation Agreement with respect to the Renewables JV (iv) Formation Agreement with respect to the Global Nuclear and French Steam JV, and (v) Master Purchase Agreement in relation to the Signalling Transaction. All these agreements were executed on 04.11.2014.
7. The Commission, in its meeting held on 12.12.2014, decided that the notice filed by the Parties on 24.11.2014 is not in conformity with the Combination Regulations and therefore, not valid in terms of Regulation 14 of the Combination Regulations. The



Commission directed that the Parties be required to file a fresh notice in Form II. In compliance with the said directions of the Commission, the Parties filed fresh notice bearing registration no. C-2015/01/241 on 14.01.2015.

8. GE, through their authorized representative, also submitted its reply to the Commission's letter dated 28.10.2014, on 15.01.2015.
9. The Commission, in its meeting held on 05.05.2015, considered the proposed combination and approved the same under sub-section (1) of Section 31 of the Act. The Commission also considered the response of GE submitted on 15.01.2015 and decided to initiate proceedings, against the Acquirers, under Section 43A of the Act.

**Proceedings under Section 43A of the Act**

10. In view of the above, a show cause notice ("SCN") was issued to the Acquirers under Section 43A of the Act read with Regulation 48 of the Competition Commission of India (General) Regulations, 2009 ("**General Regulations**") on 18.05.2015, requiring them 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 them for failure to file the notice for the said transaction in accordance with sub-section (2) of Section 6 of the Act. The Acquirers filed their reply to the SCN on 25.06.2015 ("**Response to SCN**") after seeking extension of time. In the said reply, the Acquirers also requested for a personal hearing in terms of Regulation 48 of the General Regulations.
11. The Commission, in its meeting held on 30.12.2015, considered the Response to SCN and granted a personal hearing to the Acquirers, as requested. The authorized representatives of the Acquirers were heard by the Commission in its meeting held on 16.02.2016. The Commission noted that vide their written and oral submissions, the Acquirers made, inter alia, the following submissions:
  - 11.1 The initial offer for Alstom's power and grid business was a unilateral offer made by GE and the terms of the transaction were not yet crystallized at the time of making the PAs. There was no certainty as to the manner in which the transaction would take



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place, scope of the assets being acquired, the identity of the acquirer, the key commercial arrangements, etc. A valid trigger for merger notification ought to be a “*binding agreement or other document for acquisition*” and not a mere unilateral communication of intention to acquire. A PA made on the basis of a mere unilateral bid is to arrive at the open offer price as on the date of PA, can be withdrawn, and without any definitive documents, should not be construed as a “*binding document*”.

- 11.2 Under the Takeover Regulations, a PA, in case of an indirect acquisition, is a simplified disclosure and can be made even before finalising the structure of the acquisition or deal specifics. In respect of indirect acquisitions, a PA is issued in procedural compliance of the Takeover Regulations to provide benefit to the Acquirer to freeze the offer price as on the date of the PA and to prevent the offer price being revised pursuant a price run on the shares of the target. A merger notification at the stage of such PA (made on the basis of a mere unilateral bid and without any definitive documents), at best, is premature and would not provide a transaction description, the key commercial terms thereof and no assurance with regards to deal certainty.
- 11.3 A provision contained in subordinate legislation, such as Combination Regulations needs to be read in accordance with the purpose envisaged under the parent statute. Further, a proviso creates an exception to the main provision and cannot expand the scope of the main provision itself. The doctrine of *nociter a socia* suggests that the two words “*agreement*” and “*other document*” used in clause (b) of sub-section (2) of Section 6 of the Act, take colour from the word “*acquisition*”. In both situations, what is contemplated is either a binding agreement or the terms of any document described, of whatever name, which remains binding on the parties. If read literally, the second proviso to sub-regulation (8) of Regulation 5 of Combination Regulations does not create an exception, but rather, expands the scope of the provision itself by clarifying what will be considered as the date of execution of a binding document, and this is contrary to set principles of statutory interpretation. Accordingly, from a statutory as well as a practical perspective, a PA does not satisfy the requirements of an “*other document*”. The Acquirers were justified in interpreting the PAs as not being valid



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triggers for merger notifications under the Act and in notifying the proposed combination only after a binding agreement for acquisition was executed.

- 11.4 On a legitimate and purposive interpretation of the provisions of the Act and the Combination Regulations, the requirement to notify the Commission arose only upon the execution of a binding agreement, i.e. the Master Agreement, and not a mere communication of intent to acquire on the basis of a unilateral offer for the indirect acquisition. Section 43A of the Act empowers the Commission to impose a penalty if parties fail to give a notice in terms of sub-section (2) of Section 6 of the Act. As such, GE complied with sub-section (2) of Section 6 of the Act and it would not be appropriate to subject GE to a penalty under Section 43A of the Act.
- 11.5 A PA is not a communication made to SEBI as it does not require SEBI to take any action on the basis of the communication. Moreover, the Takeover Regulations do not require PAs to be addressed to SEBI. SEBI is not required to approve, or even acknowledge receipt of the PA. The purpose of a PA is merely to inform the public at large of an impending proposed deal, the specifics of which are yet to be formalized. A copy of the PA is sent to SEBI for information or record purposes only. Merely sending a copy to any person, for information and/or record purposes only, without requiring such person to act in any manner, cannot be considered to be “communication” as intended by the Act and the Combination Regulations.
- 11.6 The Acquirers acted in good faith and proactively engaged with the Commission from the date of making the PAs until filing of the notice, keeping the Commission updated on the developments regarding the transaction.
12. The Commission observes that sub-regulation (8) of Regulation 5 of the Combination Regulations, as applicable on the date of PAs, provides that the reference to the “other document” in clause (b) of sub-section (2) of section 6 of the Act shall mean any binding document, by whatever name called, conveying an agreement or decision to acquire control, shares, voting rights or assets. Further, second proviso to sub-regulation (8) of Regulation 5 of the Combination Regulations provides that where such a document has



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not been executed but the intention to acquire is communicated to the Central Government or State Government or a Statutory Authority, the date of such communication shall be deemed to be the date of execution of the other document for acquisition.

13. In the present case, in order to establish that the Acquirers failed to give notice regarding the proposed combination to the Commission in accordance with sub-section (2) of Section 6 of the Act, the following three facts are required to be established:
  - i. The Acquirers had an intent to acquire shares in the Targets;
  - ii. The Acquirers communicated such intent to a Statutory Authority / Central Govt. / State Govt (in the present case, Securities and Exchange Board of India (“SEBI”)).
  - iii. The Acquirers failed to give notice to the Commission within thirty days of communication of such intent to SEBI.
14. In the present case, the binding offer made by the Acquirers qualifies as intent to acquire. Further, GE communicated this intent to acquire to SEBI, which is a statutory authority incorporated under Securities and Exchange Board of India Act, 1992, in form of the public announcement made on 05.05.2014. This fulfils the requirement of second proviso of sub-regulation (8) of Regulation 5 of the Combination Regulations and thus constitutes a valid trigger for filing a notification with the Commission under sub-section (2) of Section 6 of the Act. Thus, in accordance with the timelines provided in sub-section (2) of Section 6, the notice should have been given to the Commission by 04.06.2014.
15. With respect to the submissions of the Acquirers, as mentioned above, the Commission observes that:
  - 15.1 With regard to the submission by the Acquirers that “a valid trigger for merger notification ought to be a “binding agreement or other document for acquisition” and not a mere unilateral communication of intention to acquire”, the Commission notes that the term “other document” used in sub-section (2) of Section 6 of the Act subsumes documents which convey an intent of the acquirers to consummate the



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transaction and would include *inter alia* unilateral communication such as a public announcement made under Takeover Regulations and/or unilateral board resolutions such as in case of hostile acquisitions. Therefore, the argument put forth by the Acquirers regarding unilateral communication not constituting valid trigger cannot be accepted. In relation to the contention of the Acquirers that public announcement is not a communication to SEBI, it is observed that as per Black's Law Dictionary, 'communication' is "(1.) the expression or exchange of information by speech, writing, gestures, or conduct; the process of bringing an idea to another's perception. (2.) the information so expressed or exchanged". Thus, the definition of the word communication includes both one way and two way expression of information. Thus, even if the argument of the Acquirer were to be accepted that SEBI is not required to take any action on the basis of public announcement, then sending a copy to SEBI will constitute a "communication" under the provisions of sub-regulation (8) of Regulation 5 of Combination Regulations.

15.2 Further, the Commission observes that the argument that the words "other document" should be read in conjunction with the word "agreement" is misplaced. Such narrow interpretation of "other document" would defeat the purpose of regulation of combinations as according to the said interpretation, all acquisitions wherein there is no agreement executed between the target and the acquirers would not be notifiable to the Commission. The purpose of regulation of combinations is to inquire into whether the proposed combination which meets the jurisdictional thresholds is likely to have an appreciable adverse effect on competition in relevant markets in India. Whether such combination was entered into by way of an agreement or through market purchase or through a unilateral decision is immaterial to the said inquiry.

15.3 The interpretation of the words "other document" in light of the preceding word "agreement" would be contrary to the established legal principles which provide that the interpretation of *noscitur a sociis* cannot be applied where the wider words are intentionally used by the legislature in order to make the scope of the defined word correspondingly wider. The Commission observes that the words "other



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document” cannot be construed ejusdem generis and notes that in Jagdish Chander Gupta Vs. Kajaria Traders (India) Ltd. AIR1964SC1882, the Hon’ble Supreme Court has observed that “[w]hen in a statute particular classes are mentioned by name and then are followed by general words, the general words are sometimes construed ejusdem generis, i.e., limited to the same category or genus comprehended by the particular words. But it is not necessary that this rule must always apply. The nature of the special words and the general words must be considered before the rule is applied. In Allen v. Emerson [1944] 1 K.B. 362., Asquith J. gave interesting examples of particular words followed by general words where the principle of ejusdem generis might or might not apply. We think that the following illustration will clear any difficulty. In the expression "books, pamphlets, newspapers and other documents" private letters may not be held included if 'other documents' be interpreted ejusdem generis with what goes before. But in a provision which reads "newspapers or other document likely to convey secrets to the enemy", the words 'other documents' would include document of any kind and would not take their color from 'newspapers'. It follows, therefore, that interpretation ejusdem generis or noscitur a sociis need not always be made when words showing particular classes are followed by general words. Before the general words can be so interpreted there must be a genus constituted or a category disclosed with reference to which the general words can and are intended to be restricted.” Since the word “agreement” does not constitute a genus in sub-section (2) of section 6, the term “other document” which follows the word “agreement” cannot be interpreted ejusdem generis and noscitur a sociis does not apply regarding interpretation of the said word. Therefore, the Commission has the power to explain the scope of the term “other document” by way of its regulations and orders. Nevertheless, in the present case, the deeming provision under second proviso to sub-regulation (8) of Regulation 5 of the Combination Regulations is not with respect to “other document” but the date on which the other document is deemed to be executed.

- 15.4 The contention of the Acquirers that terms of initial offer were not crystallized at the time of the PAs is also not relevant as a public announcement typically contains



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basic details of the proposed acquisition including details of number of shares/voting rights to be acquired and the entities involved in the transaction.

- 15.5 Further, in the event the initial understanding between the parties undergoes a change, then the Combination Regulations provide for the situations where the parties to the combination can inform the Commission about changes in the proposed combination. Regulation 16 of the Combination Regulations provide for the procedure to intimate changes in the information provided in the notice. Similarly, Regulation 17 of the Combination Regulations provide that the proceedings under the Act, relating to the combinations, shall be terminated upon receiving an intimation from the person(s) or enterprise(s) who filed the notice to the effect that the proposed combination will not take effect. These provisions are of relevance to suggest that the Combination Regulations, in fact, perceives the possibility of a notified combination undergoing subsequent changes even to the extent of rescinding the very transaction. However, these provisions are of no relevance to determine the obligation of the parties to a combination to give notification to Commission under sub-section (2) of Section 6 of the Act.
- 15.6 A public announcement gains significance as the trigger for filing notification as it is not necessary that such public announcement for acquisition of shares of a listed company would be followed or preceded by an agreement; for example, such acquisition can take place through allotment or market purchases also.
- 15.7 It is further observed that the ability to withdraw a PA (made under the Takeover Regulations) is of no consequence to determine whether the same falls within the scope of the term “other document” and accordingly, whether notification under sub-section (2) of Section 6 of the Act is required to be given to the Commission. It is noted that most of the regulations such as Takeover Regulations (issued under SEBI Act) and Combination Regulations (issued under the Act) provide for withdrawal, termination, notification of change in the transaction(s) etc. These flexibilities relate to procedural aspects of respective compliance requirements and the same cannot be cited or interpreted to evade compliance of other regulations. If



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one were to agree with the arguments of the Acquirers that the PA could be withdrawn and therefore, it is not a binding commitment; then several acquisitions pursuant to a public announcement, under the Takeover Regulations, would not be notifiable to the Commission. This, in effect, is likely to evade the scrutiny/assessment of the Commission in respect of certain combinations that may have adverse competition concern only because there is no agreement between the parties. Moreover, the binding nature of PA is not important in the present case as the second proviso to sub-regulation (8) of Regulation 5 of the Combination Regulations does not require a binding document to be executed. On the contrary, it provides that if the “other document” (which is a binding document) is not executed, but the intention to acquire has been communicated to a statutory authority, the date of such communication shall be deemed to be the date of execution of other document.

15.8 Further, the distinction between direct and indirect acquisition (under the Takeover Regulations) is of no relevance for the purpose of determining the notification requirement under the Act read with Combination Regulations. Unlike the Takeover Regulations, the provisions of the Act and the Combination Regulations do not distinguish between direct and indirect acquisitions. Clause (a) of Section 2 of the Act defines the term “*acquisition*” as directly or indirectly acquiring the subject matters specified therein. Therefore, no distinction could be made in the compliance requirements depending on the agreement or other document providing for either direct or indirect acquisition.

15.9 The Commission notes that the public announcement made by the Acquirers provided that an agreement would be executed at a later date. However, as provided above, the timelines for filing notice commences from the date of public announcement. The Commission further observes that in the event the Acquirers required any guidance regarding which document would be the trigger document for notification purposes, they could have approached the Commission under a pre-filing consultation procedure before the expiry of 30 days from the issue of public announcement. The Commission observes that the Acquirers, being large



corporations, are deemed to be aware of the applicable regulations in India or to be able to obtain adequate assistance regarding the notification process in India, including but not limited to notification triggers under the Indian law. In the present case, the Acquirers are deemed to have knowledge of existence of second proviso to sub-regulation (8) of Regulation 5 of the Combination Regulations and thus, ought to have filed the notice within 30 days of communication of their intent to acquire the Targets to SEBI.

- 15.10 The Commission notes that post expiry of the timelines provided in sub-section (2) of Section 6 of the Act, the Acquirers informally sought clarification regarding the applicable trigger though they could have sought clarification under the pre filing consultation procedure. Such conduct shows that the Acquirers were aware of second proviso to sub-regulation (8) of Regulation 5 of the Combination Regulations and yet chose not to file the notice within 30 days of the public announcement. However, the conduct also shows the bona fide of the Acquirers regarding their intent to file the notice and the same has been taken as a mitigating factor for imposition of penalty.
16. Thus, in view of the foregoing, the Commission is of the view that the Acquirers failed to give notice to the Commission within 30 days of the PAs, in accordance with sub-section (2) of Section 6 of the Act read with sub-regulation (8) of Regulation 5 of the Combination Regulations, which attracts penalty under Section 43A of the Act. Section 43A of the Act reads as under:
- “If any person or enterprise who fails to give notice to the Commission under sub-section (2) of section 6, the Commission shall impose on such person or enterprise a penalty which may extend to one per cent of the total turnover or the assets, whichever is higher, of such a combination.”*
17. As per the details provided by the Parties, the value of their worldwide assets and turnover are as follows:



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*Figures in USD Million*

<b>Enterprise</b>	<b>Assets</b>	<b>Turnover</b>
<b>GE</b> <i>(For the year ending 31.12.2013)</i>	656,560.00	146,045.00
<b>ALSTOM</b> <i>(For the year ending 31.03.2014)</i>	38,783.71	27,313.40
<b>Total</b>	<b>6,95,343.71</b>	<b>1,73,358.40</b>

18. Accordingly, in terms of Section 43A of the Act, the Commission can levy a maximum penalty of one per cent of the combined value of worldwide assets of the Parties i.e. USD 6,953 million (approximately INR 46,000 crore). While determining the quantum of penalty, the Commission considered (a) the bona fide conduct of the Acquirers as regards the intent to file the notice, albeit after the expiry of statutory timelines; and (b) the fact that the combination was not consummated by the Acquirers without the approval of the Commission. In view of the foregoing, the Commission considered it appropriate to impose a penalty of INR 5,00,00,000/- (INR five crore only) on the Acquirers, which is approximately 0.0001 per cent of the combined value of worldwide assets of the Parties. The Acquirers shall pay the penalty within sixty (60) days from the date of receipt of this order.
19. The Secretary is directed to communicate to the Acquirers accordingly.