COMPETITION COMMISSION OF INDIA

17th May 2022

Proceedings against Veolia Environnement S.A. under Section 43A of the Competition Act, 2002

CORAM:

Mr. Ashok Kumar Gupta
Chairperson

Ms. Sangeeta Verma
Member

Mr. Bhagwant Singh Bishnoi
Member

Appearances during the hearing

For Veolia Environnement S.A: Ms. Nisha Kaur Uberoi, Arguing Counsel & Authorised Legal Representative, Advocate along with Mr. Gautam Chawla, Ms. Harshita Parmar and Ms. Shambhvi Sinha Authorised Legal Representatives and Advocates.

Order under Section 43A of the Competition Act, 2002

1. This Order shall dispose of the proceedings under Section 43A of the Competition Act, 2002 (**Act**) initiated against Veolia Environnement S.A (**Veolia**) in relation to part-consummation of proposed takeover of the Suez S.A. (**Suez**).

2. Veolia is a listed company headquartered in France and listed on the Euronext Stock Exchange in Paris. Veolia is stated to be active in optimized resource management and provides water, waste, and energy management solutions to both industrial and municipal clients. Through its three business activities, Veolia helps develop access to resources, preserve available resources, and replenish them. In India, Veolia operates through its subsidiary, Veolia India Private Limited (**Veolia India**). It offers the entire range of water solutions, including engineering and construction services, operations and maintenance services, performance contracts, and major maintenance and refurbishment tailored to the specific needs of municipality and industry across India and, more widely, South Asia.

3. Suez is a company headquartered in France and is listed on the Euronext Stock Exchange in Paris. It is stated to provide water and waste management solutions to industrial and municipal clients. It is stated that Suez has been active in India for over 30 years and has been helping local authorities and industry develop resource management solutions, particularly through contracts to build and operate facilities and improve drinking water distribution services, and developing alternative resources, such as by reusing wastewater.

Background

4. On 17th September 2020, the Competition Commission of India (**CCI/Commission**) received an application from Suez under Section 20(1) and Section 33 of the Act in relation to the proposed takeover of Suez by Veolia (**Suez Application**). In the said application, Suez had stated that, based on the press release and public presentation prepared by Veolia, Veolia proposed to carry out the proposed takeover in two steps: (i) Veolia acquiring 29.9% shareholding in Suez from an existing shareholder, viz., Engie S.A (**Engie/Seller**) [**Engie Block Transaction/Relevant Transaction**] and (ii) Veolia launching a public bid for the remaining Suez shares [**Public Offer**] (**Proposed Takeover**).

5. Suez had also submitted in its application that the Proposed Takeover is a combination notifiable to the Commission. It was submitted that, while the Proposed

Takeover is happening in France, there will be an indirect acquisition of control over thirteen (13) Suez India entities by Veolia pursuant to the Proposed Takeover. Based on the value of Indian turnover and assets of Suez for the FY ending 31st March 2019, Suez submitted that the Proposed Takeover will not be able to avail the exemption set out in Notification No. S.O. 988(E) dated 27th March 2017 issued by the Ministry of Corporate Affairs (**MCA**), Government of India (**Target Exemption**), as the turnover and assets exceeded the 1000 crore and 350 crore thresholds, respectively. With respect to the value of assets and turnover for FY ending 31st March 2020, it was submitted that the audited figures for Suez (through Suez India entities) were currently unavailable; however, both value of assets and turnover for FY ending 31st March 2020 will exceed the figures provided for FY ending 31st March 2019. Further, the combined value of assets of Suez and Veolia alone exceed the jurisdictional thresholds set out on Section 5 of the Act.

6. Suez submitted that the Proposed Takeover warrants close scrutiny to address likely post-combination concerns that may arise in Engineering Procurement and Construction (**EPC**) and Operations and Management (**O&M**) for the construction of water and wastewater management facilities. Additionally, Suez submitted that part-consummation of the Proposed Takeover would lead to (i) combination of two significant competitors, resulting in heavy market concentration and (ii) substantial lessening of competitive constraints in the markets where Veolia and Suez operate in India.

7. On 22nd September 2020, the Commission considered the application of Suez and directed it to file relevant material to support the said claims. Suez provided additional/requisite information via its submissions dated 23rd, 24th, and 28th September 2020 (**Suez's Submissions**). On 29th September 2020, the Commission forwarded Suez's Submissions, including Suez Application, to Veolia and directed that a response be filed by 13th October 2020.

8. On 13th October 2020, Veolia submitted the response and also filed an additional submission on 16th October 2020 (**Veolia's submissions**). In its response, Veolia submitted that the worldwide asset threshold set out in Section 5(a) of the Act was

exceeded by the value of assets of Veolia alone (worldwide and in India). However, based on publicly available information and Veolia's knowledge and best estimates, Veolia understands that the Target Exemption was available for the Engie Block Transaction, and, accordingly, this transaction did not require the approval of the Commission prior to completion.

9. By way of background, Veolia submitted that, on 31st July 2020, Engie had announced its intention to review its strategic orientation and consider divestments of non-core businesses and minority stakes (including its stake in Suez). Following this, on 30th August 2020, Veolia made a firm offer for the acquisition of 29.9% of the equity shares of Suez from Engie. Pursuant to Engie's acceptance of Veolia's offer, Veolia and Engie entered into a Share Purchase Agreement (**SPA**) for the purchase of Suez shares from Engie on 5th October 2020, and on 6th October 2020, Veolia completed the Relevant Transaction. Further, Veolia confirmed its intention to file the voluntary public takeover bid for the remaining share capital of Suez.

10. With respect to the methodology employed by Veolia to estimate Suez's revenue in India for ascertaining the applicability of Target Exemption to the Relevant Transaction, Veolia submitted that, since this transaction was negotiated and completed without the involvement of Suez, it had relied on publicly available financial statements and information in respect of Suez in its Universal Registration Document for 2019 filed with Autorite Des Marches Financiers on 9th April 2020 under Regulation (EU) 2017/1129 (**Suez Registration Document**) and applied reasonable assumptions based on its knowledge and experience thereon to conclude that the revenue generated in India by SUEZ would be less than INR 1,000 crore.

11. In its response, Veolia clarified that, in the Suez Registration Document, the revenues generated by the Suez group from the Indian subcontinent (including India, Sri Lanka, and Bangladesh) for the previous financial year, i.e., the financial year ending 31st December 2019, were stated to be EUR 132 million (INR 1,117 crores), and based on knowledge of its own joint venture with Suez in Bangladesh and the information available in the public domain for Sri Lanka, Veolia made reasonable assumptions and calculations that Suez's revenue in Bangladesh would be EUR 18.2

million (approx. INR 154 crores) and in Sri Lanka would be EUR 35 million (approx. INR 296 crores). Accordingly, deducting the revenues estimated to be generated by Suez in Sri Lanka and in Bangladesh from the total revenue generated in the Indian subcontinent by Suez, Veolia arrived at the best estimates of Suez's revenue in India for the previous financial year as EUR 78.8 million, i.e., approx. INR 667 crores, which was below Target Exemption thresholds.

12. Further, Veolia submitted that, according to the group structure chart for Suez, as provided in the Suez Registration Document, Suez had a single subsidiary in India, i.e., Suez India Private Limited (**SIPL**). Therefore, Veolia examined the annual audited consolidated financial statements of SIPL, for the financial year ending 31st March 2019 [Financial Year (FY) 2018 – 19], as available on the database maintained by MCA. The financial statements of SIPL for FY 2018 – 19 showed that the revenue generated by SIPL on a consolidated basis was INR 389.8 crore. Accordingly, Veolia inferred that the revenue of SIPL for FY 2019 – 20 would also be below the turnover threshold of INR 1,000 crores (even if Suez's Indian turnover was to be estimated on this basis), and therefore, benefitted from the Target Exemption. Veolia also submitted that, in any event, should the Commission conclude that the Relevant Transaction was notifiable in India, it would file a merger notification without any delay.

13. Furthermore, Veolia contended in its response that the value of Suez's Indian turnover, as stated in Suez's letter to the Commission, was not in line with the definition of turnover accepted by the Commission, as it included 'other income' and 'revenue generated from intra group sales'.

14. On 10th November 2020, the Commission forwarded Veolia's submissions to Suez and sought additional information/clarifications from Suez in light of Veolia's submissions, including the details of assets and turnover of Suez in India in terms of provisions of Section 5 of the Act, breakup of the enterprise level turnover for each of Suez India Entities in terms of intra group/non-intra group/other turnover, and comments on the submission filed by Veolia on 13th October 2020.

15. On 18th December 2020, Suez submitted its response to the Commission's letter. In its response, Suez provided the combined asset and turnover of Suez India entities for FY ending 31st March 2020 as well as breakup of the enterprise level turnover for each of Suez India Entities in terms of intra group/non-intra group/other turnover for FY 2018 – 19 as well as FY 2019 – 20 showing that the Target Exemption was not applicable to the Proposed Takeover in either financial year. Further, Suez submitted that Veolia did not conduct proper due diligence to identify the proper indirect presence of Suez in India. In doing so, Veolia failed to arrive at a reasonable estimation of Suez's indirect turnover in India.

Initiation of Proceedings under Section 20(1) and Section 43A of the Act

16. On 11th January 2021, the Commission considered the various submissions and the material placed on record by Suez and Veolia and, upon due consideration of the same, was of the opinion that the Target Exemption was not applicable to the Proposed Takeover. Further, the asset turnover threshold criteria for the purpose of Section 5 of the Act was also satisfied. Therefore, the Proposed Takeover was squarely covered as a combination under Section 5 of the Act, and Veolia was required to seek approval from the Commission under Section 6(2) of the Act before completing the purchase of Suez shares from Engie.

17. Based on aforesaid, the Commission was of the opinion that the Proposed Takeover was notifiable to the Commission, and by partially consummating the same before notifying the Commission, Veolia had contravened the provisions of Section 6(2) and 6(2A) of the Act. Consequently, the Commission decided to initiate proceedings under Section 43A of the Act read with Regulation 48 of General Regulations of the Competition Commission of India (**General**) Regulations, 2009 (**General Regulations**) against Veolia and issued a Show Cause Notice (**SCN**) to Veolia dated 3rd February 2021.

18. Further, the Commission decided to initiate an inquiry in terms of Section 20(1) of the Act read with Regulation 8 of the Competition Commission of India (Procedure in regard to the transaction of business relating to Combinations) Regulations, 2011

(**Combination Regulations**) and directed Veolia to file a notice in Form II within 30 days from the date of receipt of communication from the Commission.

19. On 5th March 2021, Veolia filed a notice with the Commission in Form II (**Merger Notification**). Subsequently, on 31st March 2021, the Commission, *vide* its letter issued in terms of Regulation 14 of the Combination Regulation (**RFI**), directed Veolia to furnish certain information/clarification(s) in relation to the notice by 7th April 2021. Veolia, after seeking extension of time, submitted its response to the RFI on 8th June 2021. In its response, Veolia, *inter alia*, submitted that, on 12th April 2021, the respective boards of directors of Suez and Veolia had reached an agreement in principle on the key terms and conditions to revise the contours of the proposed transaction. On 14th May 2021, pursuant to the agreement, in principle:

    a. Veolia and Suez, following approval by their respective boards of directors, concluded the Combination Agreement, confirming their intention to merge, clarifying the conditions of the merger, and structuring the next steps of the transaction;

    b. Veolia, Suez, and a consortium of investors (**Consortium**) composed of Meridiam, Global Infrastructure Partner (**GIP**), and Caisse des Dépôts et Consignations Group (including CNP Assurances) (**CDC**), signed a Memorandum of Understanding (**MoU**) for the creation of **New Suez**, which will combine a wide range of activities and services currently provided by Suez (**Revised Agreement**)[1].

20. Based on the submissions of Veolia, the Commission, in its meeting held on 24th June 2021, noted that the nature of transaction and the scope of the business of Suez being acquired by Veolia had changed pursuant to the Revised Agreement. Therefore, it was observed that the Merger Notification was not complete and in conformity with the Combination Regulations. Consequently, the notice was invalidated and Veolia was directed to submit a fresh notice in Form II. On 15th July

[1] On 19th May 2021, as a result of the agreement, Suez withdrew all legal actions before competition authorities around the world, including before the Hon'ble Commission.

2021, Veolia submitted the fresh merger notification in Form I. However, since the Commission had directed Veolia to file the notice in Form II and also allowed for the adjustment of fees already paid, and as Veolia, on its own, had filed the notice in Form I, the Commission directed Veolia to file fresh filing fees. The same was filed on 4th August 2021. The Commission approved the proposed transaction mentioned in the above notice on 23rd November 2021. However, the said approval was without prejudice to proceedings under Section 43A.

21. In relation to the proceedings under Section 43A, Veolia, earlier, on 9th June 2021, had submitted a response to SCN issued under Section 43A of the Act (**Response dated 9th June 2021**) after seeking extensions of time. In that response, Veolia had also requested for an oral hearing before the Commission. The Commission, in its meeting held on 24th June 2021, considered the said response and directed Veolia to appear before the Commission on 15th July 2021. Subsequently, Veolia, *vide* its letter dated 7th July 2021, *inter alia*, requested the Commission to allow it to submit a revised and updated response to the notice under Section 43A of the Act in view of the changes in the nature of the transaction and also requested postponement of oral hearing to a date after the filing of the revised and updated response. Thereafter, on 4th August 2021, Veolia submitted a revised response (**Response dated 4th August 2021**) to SCN. Veolia also reiterated its request for an oral hearing, which was allowed by the Commission. The Commission heard Veolia at length on 11th January 2022. The Commission also allowed Veolia to file written submissions, which were filed on 18th January 2022.

Submissions of Veolia

22. In response to SCN, Veolia, *inter alia*, submitted that the reason for not notifying the Engie Block Transaction to the Commission was that it was under a *bona fide* belief that the acquisition of the Engie Block was not a notifiable 'combination' under the Act. Veolia submitted that, as a first step, it had to undertake the assessment of the applicability of the Target Exemption to the Engie Block and the Proposed

Transaction[2]; however, there were constraints on Veolia from procuring such financial data/statements directly from Suez due to the adversarial, unsolicited, and hostile nature of the acquisition and the consequent lack of Suez's co-operation. Thus, Veolia had no option but to rely on the publicly available information and documents of Suez, namely, (i) Suez Registration Document and (ii) Suez's information available on the database maintained by the MCA, to undertake an assessment of the thresholds under the Act and the relevant notification, and make reasonable assumptions from the same.

23. Veolia submitted that it did not have access to the detailed financial information of Suez provided by Suez to the Commission, which appears to significantly differ from the financial information of Suez available in the public domain and which led to the conclusion that the Target Exemption is not applicable. The Suez Submission of 18th December 2020 which was communicated to Veolia also redacted the financial details of relevant Suez entities in India, considering them confidential vis-à-vis Veolia. Suez itself expressly stated in its submission that: "*This information is not available in the public domain and is only known to the Parties and their advisors*." Thus, the redactions clearly demonstrated that Veolia could not have had access to this financial information prior to the Engie Block Transaction. Accordingly, Veolia in no manner can be said to be in contravention of Section 43A of the Act as, based on Suez's own submission, it can be demonstrated that Veolia could not have had access to the financial information prior to (or even after) the acquisition of the Engie Block. Thereby, given the limited information available to Veolia, the acquisition of the Engie Block (and the Proposed Transaction) availed of the Target Exemption, as such, did not trigger any notification requirement under the Act.

24. Veolia submitted that it has always acted in a *bona fide* manner throughout the proceedings and sought to co-operate to the fullest extent with the Commission. Prior to the Merger Notification, Veolia set out its various submissions in a *bona fide* and transparent manner and duly disclosed all the relevant documents/information to the

[2] The proposed acquisition of at least 50% + 1 of the share capital of Suez by Veolia through a voluntary public takeover bid, i.e., Public Offer under Section 6(2) of the Act (**Proposed Transaction**).

Commission in its submissions given on 13th October 2022 and 16th October 2020, voluntary PFC request on 18th December 2020, and draft notification on 29th January 2021. Subsequently, after filing the Merger Notification, when the nature of the Proposed Transaction was undergoing a change from a hostile takeover to the current construct pertaining to the formation of New Suez, Veolia duly disclosed the same to the Commission, providing details of the in-principle agreement between the parties and intended aim of entering into a definitive merger agreement by 14th May 2021.

25. Further, on 15th July 2021, pursuant to the directions of the Commission, Veolia submitted a fresh merger notification well within the 30 day period provided by the Commission for such filing. The fresh merger notification was submitted in Form I, as the combined market shares of the Parties pursuant to the Revised Agreement were below 5%. Also, the Suez WTS Business being acquired by Veolia as well as the New Suez Business, i.e., the business of Suez being transferred to New Suez being acquired by the Consortium, in which Veolia has no shareholding, benefitted from Target Exemption. However, without prejudice to the above and in the interest of full and complete disclosure and cooperation with the Commission, given that the consolidated value of assets and turnover of Suez as a whole in India exceeded the thresholds for Target Exemption, the fresh merger notification was submitted to the Commission in accordance with the Commission's direction to re-notify.

26. Veolia submitted that the Proposed Transaction, in any case, will not have any Appreciable Adverse Effect on Competition (**AAEC**) in any market in India, since the activities in relation to (i) the markets for drinking water management services and wastewater management services in India, and (ii) the overall market for waste management services in India (i.e., recycling of ferrous and non-ferrous metals (from scrap) in India) would be simultaneously (or very shortly thereafter) transferred to New Suez, in which Veolia will have no direct or indirect shareholding by the end of 2021, and in the water technologies solutions (**WTS**) market in India, (i) Suez's presence is insignificant and limited to industrial customers only, (ii) Veolia has no presence in this market and has no industrial customers in India, and (iii) this market is characterized by the presence of several large established players. Moreover,

Veolia and New Suez would continue (i) to remain competitors post the Proposed Transaction in the markets for provision of drinking water management services in India and wastewater management services in India, and (ii) to operate in different segments of the overall market for waste management services in India. Moreover, Suez has failed to demonstrate any prejudice/injury caused to Suez or competition in India by Veolia's alleged failure to notify the acquisition of the Engie Block Transaction.

27. Further, Veolia submitted that competition regulators in other jurisdictions, such as Europe or Canada, where Suez had claimed similar gun-jumping issues, appreciated the *bona fide* intentions of Veolia and have either (i) rejected the gun-jumping claim by Suez or (ii) have found it appropriate not to initiate any gun-jumping proceedings against Veolia for the acquisition of the Engie Block or impose any penalty on Veolia. Further, in India, the report of the Competition Law Review Committee (**CLRC Report**) recommended that standstill obligations under the Act be modified to allow parties to complete on-market purchases, including unsolicited acquisitions. Veolia submitted that the proposed conditions of the Draft Regulation and the Amendment Bill are met in the present case

28. Veolia stated that it had no intention to avoid the jurisdiction or escape the Commission's merger review. In fact, Veolia acts in compliance with all the laws of the country, including the Act, and has put in place a Competition Law Compliance Policy as a responsible corporate entity. Further, it has never been in contravention of the provisions of the Act, and thus, a lenient view may be taken by the Commission with respect to the acquisition of the Engie Block Transaction.

Commission's Analysis and Finding

29. The Commission has considered the submissions of Veolia as well as heard the arguments advanced by the learned counsel. It is observed that, as per the provisions of the Act, when Veolia made a firm offer for the acquisition of 29.9% of the share capital of Suez and voting rights from Engie on 30th August 2020, there was an obligation upon Veolia to file a notice under Section 6(2) of the Act. However, it

completed the purchase of shares from Engie without filing any notice with the Commission. Therefore, the issue for determination in relation to the SCN issued to Veolia is "Whether Veolia, by partially consummating the Proposed Takeover i.e., completing the Engie Block Transaction without filing a notice under Section 6(2) of the Act, has contravened the provisions of Section 6(2A) of the Act and is, hence, liable for penalty under section 43 A of the Act."

30. As stated earlier, Veolia has contended that it was under a *bona fide* belief that the Engie Block transaction benefitted from the Target Exemption. Since it was a case of hostile takeover accurate values of assets and turnover of Suez in India was not available, therefore, reasonable assumptions were made based on publicly available information.

31. However, Suez, in its response dated 18th December 2020, contended that Veolia had not adhered to the very minimum standards of due diligence while identifying the Indian presence of Suez and assessing the Indian assets and turnover of Suez for ascertaining the notifiability of the Proposed Takeover. Suez in its response referred to multiple publicly available sources that would have shown that SIPL is not the only subsidiary/indirect presence of Suez in India. For instance, Suez submitted that:

    a. Veolia failed to consider Suez's subsidiaries, namely, (i) Driplex Water Engineering Private Limited and (ii) Driplex Water Engineering International Private Limited (jointly **Driplex**) even though the website of Suez India mentioned that Suez had acquired stakes in Driplex in 2016 and further in 2017. This information was also available in its press release dated 22nd January 2016. Further, the Suez Registration Document relied on by Veolia also mentions the majority stake acquisition of Driplex by Suez. While this information was available widely, Veolia failed to consider Driplex as a subsidiary of Suez while calculating the "best estimate" turnover.

    b. Similarly, Veolia also failed to consider Suez's subsidiary, namely, Suez Water Technology & Solutions (India) Private Limited. As available on the website for

Suez Water Technologies and Solutions, Suez acquired GE Water in 2017. The same is also available in the form of a press release dated 2nd October 2017.

c. Veolia also failed to consider Suez's subsidiary Suez Projects Private Limited, even though it was mentioned in a news article dated 13th December 2019 that the Suez group, through Suez Projects Private Limited, had entered into a contract for the rehabilitation and operation of drinking water distribution in Mangalore, India.

d. Further, Veolia failed to consider Suez's joint venture with SMPL in India, when Suez, on its website, had clarified that it formed a joint venture with SMPL in India to develop the water distribution facility in Delhi.

32. Having considered submissions received from Veolia and Suez, it appears that, while Veolia has asserted that it acted in a *bona fide* manner and made all reasonable attempts to ascertain the assets and turnover of Suez in India for the purposes of assessing the applicability of Target Exemption, the conduct indicates to the contrary. For instance, Veolia has contended that the actual asset and turnover figures of the Target in India were not available with it at the time of acquisition of Engie Block and it believed that Suez had only one (01) India entity, i.e., SIPL. However, based on the sequence of events, it appears that, at least a week before the Engie Block Transaction, the Commission had forwarded to Veolia Suez Application and other Suez submissions, which identified thirteen (13) Suez India entities as well as provided the value of Indian turnover and assets of Suez for the FY ending 31st March 2019 (from select eight (08) Suez India Entities). As such, the communication from the Commission ought to have raised doubts about the assumptions made by Veolia, and it could have approached the Commission to seek clarification about the applicability of Target Exemption to the Proposed Takeover prior to completion of the Engie Block Transaction. Instead, Veolia consummated the Engie Block Transaction on 6th October 2020. Further, Veolia has submitted that it voluntarily approached the Commission by way of a pre-filing consultation (**PFC**) on 18th December 2020, in relation to the Merger Notification. However, the Commission is constrained to note that Veolia approached for such PFC in respect of the Proposed

Transaction long after the completion of the Engie Block Transaction. In any case, PFC facility is non-binding in nature and provided only to assist the parties to comply with the requirements of the Act.

33. Notwithstanding whether the conduct of Veolia was *bona fide* or not, the values of asset and turnover for Suez India entities for the year FY 2018 – 19 as well as FY 2019 – 20 establish that the Proposed Takeover did not benefit from Target Exemption. Hence, as per the provisions of the Act, Veolia was required to file a notice with the Commission under Section 6(2) of the Act, prior to completion of the Engie Block Transaction, and by not doing so, it breached the provisions of Section 6(2A) of the Act. The position that Section 43A would be attracted in case of such breach irrespective of intent has been laid down by the Hon'ble Supreme Court in *Competition Commission of India v. Thomas Cook (India) Limited*[3], wherein the Hon'ble Supreme Court observed as under:

".... For the imposition of penalty under section 43A, the action may not be mala fide in case there is a breach of the statutory provisions of the civil law, penalty is attracted simpliciter on its violation."

Further, it was observed that:

"There was no requirement of mens rea under section 43A or intentional breach as an essential element for levy of penalty. Section 43A of the Act does not use the expression "the failure has to be willful or mala fide" for the purpose of imposition of penalty. The breach of the provision is punishable and considering the nature of the breach, it is open to impose the penalty."

Similar observations were made by the Supreme Court in *SCM Solifert Limited & Anr v. Competition Commission of India*[4] also.

34. It is to be noted that the merger control regime in India is mandatory and suspensory in nature. Section 5 provides the assets and turnover criteria to determine which

[3] Civil Appeal No.13578 of 2015
[4] Civil Appeal No. 10678 of 2016

acquisitions of control/shares/voting rights/assets or mergers and amalgamations will amount to combination under the Act. Section 6(2) of the Act mandates parties to give notice in respect of the proposed combination. In case of acquisitions, the trigger for notifying the transaction to the Commission is the execution of any agreement or other document for the acquisition of control/shares/voting rights/assets referred to in Section 5(a) or acquiring of control referred to in Section 5(b) of the Act. Section 6(2A) of the Act provides that a combination notified to the Commission shall not come into effect for a period of 210 days from the date of notification or earlier approval by the Commission. The provisions in effect imply that the merger and acquisitions that can be considered combinations in terms of Section 5 of the Act are mandatorily notifiable to the Commission, and therefore, cannot be consummated, either entirely or in part, without approval from the Commission, unless they are exempted by Government of India notification or are combinations that fall under Schedule 1 of Combination Regulation, in respect of which, a notice need not normally be filed. As noted above, the Engie Block Transaction was not exempted by any Government of India notification. Also, it was not covered under Schedule 1 of Combination Regulations and was required to be notified to the Commission prior to consummation. Such statutory obligation of Veolia was independent of any action that may have been initiated by Suez with the Commission.

35. Also, it is pertinent to note that the mandatory regime for notifying a proposed combination to the Commission is applicable irrespective of whether the combination causes any AAEC in India or not. In this regard, the Commission, in its order relating to penalty proceedings under Section 43A of the Act against Intellect Design Arena Limited, has already observed: "*.... the Act clearly provides, irrespective of whether there is any appreciable adverse effect on Competition in India or not, there is mandatory regime for notifying a combination to the Commission.*"

36. Further, the approval of the combination by the Commission also does not imply that penalty under Section 43A of the Act will not be attracted for failure to file notice

with the Commission under Section 6(2) of the Act. This position has been clearly laid down by the Hon'ble Supreme Court in *SCM Solifert Limited & Anr v. Competition Commission of India*[5], as under:

> *"The factum of the approval of the combination subsequently by the Commission is not going to provide an insulation when the provisions of the Act have been violated and prior notice had not been given under section 6(2). It was open to impose a penalty under section 43A. Merely by grant of approval by the Commission violation of provisions does not become condonable ipso facto"*

37. With respect to the contentions of Veolia regarding the decisions taken by other competition authorities in relation to gun jumping issues, it is observed that the decisions of other competition authorities are specific to their regulatory requirements. The same may not be applicable to the Indian framework. The method of evaluating transactions and the waiting/compliance timelines required to be adhered to by the Parties might be different for foreign competition authorities. Therefore, reliance cannot be placed on the decisions of other competition authorities to assess contravention under the provisions of the Act.

38. Further, the reliance placed by Veolia on the exemption which may be provided by a proposed legislation is also misplaced, as the proposed amendment is not notified or approved by the Parliament as yet. The contravention needs to be assessed on the basis of existing laws and not on prospective laws in the pipeline. Further, Veolia has highlighted the structural changes made to the transaction; however, such structural changes were made subsequent to the contravention by Veolia, i.e., post the acquisition of Engie Block. In any case, the emergence of a structural change/remedy does not absolve the Party of contravention/breach of the provision of the Act.

39. Thus, in light of the above, the Commission finds that Veolia, by acquisition of Engie Block without filing a notice with the Commission in terms of Section 6(2) of the Act prior to acquisition, has contravened the provisions of Section 6(2A) of the

[5] Civil Appeal No. 10678 of 2016

Act and hence, is liable for penalty under Section 43A of the Act, which reads as under:

"If any person or enterprise fails to give notice under Section 6(2) of the Act, 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"

40. It is to be noted that Section 43A of the Act prescribes the extent of penalty that can be levied for failure to file notice; however, the Commission has sufficient discretion to consider the conduct of the parties and circumstances of the case to arrive at an appropriate penalty.

41. Veolia, in its response to SCN, has submitted that, in the event that Veolia is considered to have acted in contravention of Section 43A of the Act, the Commission should consider factors such as no *mala fide* intention on the part of Veolia to evade compliance of the provisions of the Act, proposed amendment in recognition of the lacuna in the law relating to public market purchases, no previous violations of the Act by Veolia, *bona fide* and transparent disclosure of requisite information, continuous co-operation with the Commission's inquiry under Section 20(1) of the Act, no prejudice to competition and no AAEC in the Indian market regardless of the transaction undertaken, and non-initiation gun-jumping proceedings against Veolia for the Engie Block by other jurisdictions as mitigating factors and impose no penalty on Veolia.

42. The Commission finds that none of the above factors absolve Veolia of its obligation to file a notice prior to the consummation of the Engie Block Transaction. Further, the fact that Veolia failed to approach the Commission before the consummation of the Engie Block Transaction on 6th October 2020, even though it had received the communication of the Commission along with the Suez application and other Suez submissions on 29th September 2020, which clearly indicated non-applicability of the Target Exemption to the Proposed takeover, runs counter to the contention of Veolia that there was no intent on its part to evade compliance of the provisions of the Act.

However, considering that Veolia extended cooperation during the inquiry and supplied requisite material/documents in response to the information requirement of the Commission can be considered mitigating factors. Thus, while the Commission acknowledges that Veolia has been cooperative through the course of the proceedings; however, it cannot be exculpated of the statutory obligation to file a notice with the Commission prior to the consummation of the proposed combination.

43. Thus, considering the facts and circumstances of the case and the conduct of Veolia, the Commission decides to impose a penalty of INR 1,00,00,000/- (Rupees One Crore Only) on Veolia. Veolia shall pay the penalty within 60 days from the date of receipt of this order.

44. Further, it is made clear that nothing used in this order shall be deemed to be confidential or deemed to have been granted confidentiality, as the same have been used for the purposes of the Act in terms of the provisions contained in Section 57 thereof.

45. The Secretary is directed to inform Veolia accordingly.