COMPETITION COMMISSION OF INDIA

15th July 2022

Proceedings against SABIC International Holdings B.V. 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 SABIC International Holdings B.V.:	Mr. Rajshekhar Rao, Senior Advocate with Ms. Yamini Mookherjee, Mr. Rahul Rai, Mr. Gaurav Bansal, Mr. Nitin Nair, Ms. Shruthi Rao, Advocates along with Mr. Paolo Vacca, representative of SABIC International Holdings B.V.

ORDER UNDER SECTION 43A OF THE COMPETITION ACT, 2002

This Order shall govern the disposal of the proceedings initiated against SABIC International Holdings B.V. ('**SABIC B.V.**'/'**Acquirer**') under Section 43A of the Competition Act, 2002 ('**Act**') in relation to its acquisition of equity stake amounting to

24.99% in Clariant AG ('**Clariant**'/'**Target**') ('**First Acquisition**'/'**Share Purchase Transaction**').

2. On 29th May 2020, the Competition Commission of India ('**Commission**') received a Notice under Section 6(2) of the Competition Act, 2002 ('**Act**'), in Form I of Schedule II of the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulation, 2011 ('**Combination Regulations**'), given by SABIC B.V., a wholly owned affiliate of Saudi Basic Industries Corporation ('**SABIC**'), [Hereinafter, SABIC and SABIC B.V. are used interchangeably]. The Notice was given pursuant to a board resolution passed by the Acquirer for acquisition of an additional 6.51% shareholding of the Target, through a series of open market purchases on the SIX Swiss Exchange and via electronic trading platforms ('**Combination**'/'**Second Acquisition**'). As per the information provided in the Notice, it was observed that the Combination was preceded by the First Acquisition, which was not notified to the Commission under Section 6(2) of the Act.

A. Background

3. The First Acquisition was given effect pursuant to the execution of a Share Purchase Agreement ('**SPA**') between the Acquirer and White Tale Holdings ('**Seller'**) in January 2018. The First Acquisition was closed and brought into effect on 17th September 2018. In the Notice filed in case of Second Acquisition, the Acquirer had submitted that it currently held a 24.99% stake in Clariant.

4. The Acquirer executed a Governance Agreement ('**GA**') with the Target on 17th September 2018, wherein it was vested, *inter alia*, with the right to nominate up to four persons for election as directors on the board of the Target.

5. SABIC B.V. notified the First Acquisition in a number of international jurisdictions (such as Austria, Brazil, Canada, Germany, Japan, Mexico, Pakistan and South Korea).

6. In terms of Regulation 14 of the Combination Regulations, two letters dated 22nd June 2020 and 5th August 2020 were issued to the Acquirer ('**RFIs**') wherein it was *inter alia* asked to clarify when the First Acquisition took place and the rationale for not notifying the same in India. In this regard, the Acquirer, *vide* responses to the RFIs dated 17th July 2020, 14th August 2020 and 21st August 2020, along with voluntary submissions dated 17th June 2020 and 22nd June 2020, *inter alia*, submitted that the First Acquisition did not require notification to the Commission as it satisfied Item 1 of Schedule I of the Combination Regulations ('**Item 1 Provision**').

7. The Commission approved the Second Acquisition *vide* its order passed under Section 31(1) of the Act on 2nd September 2020 ('**Order**'), upon competition assessment of the business activities of the parties and after arriving at the opinion that the Combination is not likely to cause any appreciable adverse effect on competition ('**AAEC**') in India, without prejudice to the proceedings under Section 43A of the Act.

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

8. The Commission, in its meeting held on 4th August 2020, considered the issue of consummation of the First Acquisition without filing a notice to the Commission. The Commission considered the terms of the SPA, the timelines of the First Acquisition and the timelines and terms of the GA and the press release issued by SABIC. Based on the information on record, the Commission, *inter alia*, observed that the First Acquisition was made by the Acquirer with a strategic intent and purpose to participate in the management and affairs of the Target and it could not be considered 'Solely as an Investment' or 'Ordinary Course of Business'. Accordingly, the First Acquisition was not covered under Item 1 Provision. Considering the foregoing, the Commission was of the *prima facie* opinion that First Acquisition was in contravention of sub-section (2) and (2A) of Section 6 of the Act as the same was given effect to without giving notice to the Commission. Accordingly, the Commission issued show cause notice ('**SCN**') under Regulation 48 of the Competition Commission of India (General Regulations), 2009 read with Section 43A of the Act on 18th August 2020. The Acquirer filed its response to the SCN on 14th October 2020, after seeking an extension of time ('**Response to SCN**').

9. In its meeting held on 10th January 2022, the Commission considered the Response to SCN and decided to grant an oral hearing to the Acquirer on 1st February 2022. However, *vide* communication dated 24th January 2022, the Acquirer requested to reschedule the date of the oral hearing. The Commission accepted the request and postponed the date of hearing to 22nd February 2022. Subsequently, through applications dated 9th February 2022 and 21st February 2022, the Acquirer sought further adjournment of the oral hearing. On 22nd February 2022, the Learned Counsel for SABIC appeared before the Commission and pressed for adjournment of the hearing to 24th February 2022. Accordingly, the Acquirer was heard on 24th February 2022.

C. Submissions of the Acquirer

10. In the Response to the SCN, the Acquirer contended the following:

I. Inapplicability of jurisdiction under Section 32 of the Act in issuing the SCN

11. The Commission did not have the jurisdiction to issue SCN, as the First Acquisition was entered into between two offshore parties, i.e., SABIC B.V., incorporated in the Netherlands, and White Tale Holdings (including all its consortium members), incorporated in the USA and, separately, the GA was also executed between two offshore parties, i.e., SABIC B.V. and Clariant. In terms of Section 32 of the Act, while the Commission is empowered to examine offshore transactions, this can be done only if such a combination has or is likely to have an AAEC in the relevant market in India.

12. The Acquirer submitted that a combined reading of Sections 5 and 6 together with Section 32 of the Act suggests that a transaction between two or more offshore enterprises which takes place outside of India should (i) meet the prescribed asset and turnover value thresholds under Section 5 of the Competition Act and (ii) the Commission is empowered to apply the scheme of Act to a purely offshore transaction if such combination has or is likely to cause AAEC in any relevant market in India.

13. Thus, the Commission is required to apply the provisions of the Act to offshore combinations by taking into consideration: (i) jurisdictional thresholds prescribed under Section 5 (i.e., does the combination meet the statutory thresholds) and; (ii) the scheme of Section 32 (i.e., whether an offshore transaction would potentially cause AAEC in any relevant market in India), as any other interpretation would render Section 32 of the Act, which specifically extends to combinations taking place outside India, redundant.

II. No evidence adduced for proving the Acquirer's control over Clariant as a result of either of the two transactions

14. The Acquirer submitted that the First Acquisition did not result in acquisition of control by Acquirer over Clariant. A minority shareholding of 24.99% does not confer on the Acquirer, under the applicable Swiss laws, any voting rights that could lead to control over the management and affairs of the target, either by way of positive control or negative control (including by way of the ability to block a special resolution).

15. Further, the GA does not give the Acquirer the ability to influence the strategic matters of Clariant or indeed Clariant's Indian subsidiaries. Both Clariant and one of its Indian subsidiary, namely, Clariant Chemicals India Limited, are listed entities in their respective jurisdictions and therefore, bound to be governed by the applicable corporate governance regulations.

III. Incorrectly conflated the First Acquisition and the GA

16. The Acquirer submitted that there was a lack of simultaneity as the SPA for the First Acquisition was executed between the Acquirer and the Seller in January 2018, while the GA was executed in September 2018. Further, the First Acquisition was not conditional upon the execution of the GA. In fact, the SPA was negotiated and entered into between SABIC B.V. and the Seller, whereas the GA was entered into between SABIC B.V. and Clariant. The negotiation of the SPA was independent of the GA and was carried out between a completely different set of parties. At the time of executing the SPA for the

First Acquisition, SABIC B.V. had no certainty on whether the GA would materialize with Clariant.

*IV. Applying the wrong legal test to assess whether the Minority Acquisition Exemption ('**MAE**') applies*

17. As per the Commission's decisional practice on the treatment of control, invariably, the following factors have been considered: the entire bundle of rights, including veto rights, secured by the Acquirer, and their bearing on the strategic commercial decisions of the target enterprise; or, in case of standalone right to appoint directors without any veto rights, the Commission has assessed whether such investment was coupled with a strategic commercial agreement that allowed the nominee directors to undertake strategic commercial decision. In other words, the standalone right to nominate a director without any corresponding veto rights or a strategic commercial agreement, has not been considered by the Commission as resulting in acquisition of control.

18. That in the absence of any veto rights or other contractual rights, such a minority representation on the board in and of itself would not make the transaction strategic, as it does not confer SABIC with the right to make any operational or management decisions of Clariant. Such a minority representation on the board was always intended to allow SABIC to raise its concerns as a minority shareholder in an appropriate and constructive manner if Clariant's management or Board were to take any decision which could have eroded the value of investment made by SABIC.

19. The Acquirer has also submitted that, in arriving at its conclusion, the SCN has relied on the Press Release rather than the legally binding agreements that crystallize the commercial understanding and intent between SABIC and Clariant. In doing so, the SCN has failed to appreciate that the Parties' intent, absent any allegations of collusion or fraud, can be appropriately gauged only through binding agreements between them and not through post-agreement press releases intended for other commercial purposes.

20. In addition, the Acquirer has submitted that the SCN *prima facie* appears to be arbitrary since it does not: (i) examine the background to the First Acquisition; (ii) examine the definitive documents (such as the SPA) to the 2018 First Acquisition or the separately executed GA before coming to its erroneous conclusion; (iii) follow the Commission's own decisional practice; and (iv) apply the applicable provisions of the Competition Act read with the Combination Regulations to the First Acquisition. Instead, the SCN cherry-picks certain facts to fit its conclusion that the First Acquisition and the GA together required a notification to the Commission under the Act.

D. Analysis of the submissions of the Acquirer

21. The core issue in the instant case is whether the First Acquisition was covered under the Item 1 Provision and accordingly, was eligible for not filing the notice under sub-section (2) of Section 6 of the Act normally. In the subsequent section, the Commission has considered and determined on all the submissions of the Acquirer, including those on the core issue and other submissions of the Acquirer.

I. Jurisdiction under Section 32 of the Act

22. The Acquirer has contended that the First Acquisition was a purely offshore transaction and was therefore not required to be notified in India, as per the provisions of the Act. In this regard, it would be appropriate to first understand how the merger review regime functions under competition law in India. As per the Act, the regulatory regime for notification of combinations in India is mandatory. The mergers and acquisition ('**M&A**') transactions which are required to be notified cover instances of acquisition of shares, voting rights, control or assets. Further, the Act prescribes thresholds in terms of values of assets and turnover in India under Section 5, and the transactions which meet the same are considered combinations for the purposes of the Act.

23. The aforesaid thresholds contained in Section 5 of the Act thus determines those transactions which are to be notified as combination, and the Commission has the power to inquire if such combination has caused or is likely cause AAEC in the relevant market

in India which, in turn, is a result of an assessment undertaken by the Commission, and the same can be done only once the transaction is notified, i.e., AAEC is not a pre-condition for notification. If any transaction is an acquisition in terms of Section 5 of the Act, which is not eligible for any benefit either under Section 54 of the Act or Schedule I of the Combination Regulations, it is notifiable to the Commission under Sector 6(2) of the Act, irrespective of its likely effects on competition in India.

24. In this context, the submissions of the Acquirer that for offshore transactions, meeting of thresholds is not enough and likelihood of AAEC should be first seen for applying the scheme of the Act, is circular in nature. The entire regulatory framework of the Competition Act, 2002 relating to combinations contained under Sections 6, 20 and 32 also refer to combinations in terms of causing AAEC or likelihood of AAEC in context of assessment of such combinations, but what constitutes a combination is defined only in Section 5 of the Act and applied in a uniform manner to all instances of combinations. Therefore, once the thresholds prescribed under Section 5 are met, the Commission in terms of Section 32 of the Act can inquire into combinations taking place outside India, which will or are likely to cause AAEC in India, with the residential status of the parties to the combination being immaterial. Thus, in the instant case, the fact that the country of incorporation of the parties to the SPA and GA, i.e., the Acquirer, Seller and Target, was outside India does not preclude the Commission from inquiring and then issuing an SCN for ascertaining the likelihood of AAEC in India. Moreover, this contention of the Acquirer is self-contradictory as it has itself notified the Second Acquisition to the Commission even though the residential status of the parties to the combination has remained unchanged. Based on the aforesaid, the submissions of the Acquirer on the effect of Section 32 of the Act are not considered tenable.

II. Whether the First Acquisition is covered under Item 1 Provision

25. The Item 1 Provision reads as follows:

"An acquisition of shares or voting rights, referred to in sub-clause (i) or sub-clause (ii) of clause (a) of section 5 of the Act, solely as an investment or in the ordinary

course of business in so far as the total shares or voting rights held by the acquirer directly or indirectly, [does not entitle the acquirer to hold twenty five per cent (25%) or more] of the total shares or voting rights of the company, of which shares or voting rights are being acquired, directly or indirectly or in accordance with the execution of any document including a shareholders agreement or articles of association, not leading to acquisition of control of the enterprise whose shares or voting rights are being acquired.

[Explanation:- The acquisition of less than ten per cent of the total shares or voting rights of an enterprise shall be treated as solely as an investment: Provided that in relation to the said acquisition,-

(A) the Acquirer has ability to exercise only such rights that are exercisable by the ordinary shareholders of the enterprise whose shares or voting rights are being acquired to the extent of their respective shareholding; and

(B) the Acquirer is not a member of the board of directors of the enterprise whose shares or voting rights are being acquired and does not have a right or intention to nominate a director on the board of directors of the enterprise whose shares or voting rights are being acquired and does not intend to participate in the affairs or management of the enterprise whose shares or voting rights are being acquired.]"

26. Further, as per Regulation 4 of the Combination Regulations,

"…categories of combinations mentioned in Schedule I are ordinarily not likely to cause an appreciable adverse effect on competition in India, notice under sub-section (2) of section 6 of the Act need not normally be filed".

27. From the reading of the Item 1 Provision, it is clear that this provision is not applicable to instances where there has been an acquisition of control, as the same categorically applies to instances of acquisition of shares or voting rights not leading to acquisition of control. The benefit of Item 1 Provision has been normally provided to the acquisition of

shareholding or voting rights less than 25% and which are in the 'ordinary course of business' or 'solely as an investment'. The objective of this provision is to distinguish between instances of ordinary shareholding and strategic shareholding, falling short of position of acquisition of control.

28. Thus, even though the SCN raises the issue of acquisition of control, the primary issue relevant for determination of notifiability of the First Acquisition is whether the First Acquisition was in 'ordinary course of business' or 'solely as an investment' or not. Hence, the issue of notifiability of First Acquisition is settled in terms of applicability of Item 1 Provision in this case. Even if one of the three conditions prescribed under this item is not satisfied, the benefit of Item 1 Provision is not available. Accordingly, the Commission observed that the question of acquisition of control is irrelevant to the primary issue.

29. SABIC on its part has submitted that, in the absence of any veto rights or other contractual rights, such a minority representation on the board in and of itself would not make the transaction strategic, as it does not confer SABIC with the right to make any operational or management decisions of Clariant, and that such a minority representation on the board was always intended to allow SABIC to raise its concerns as a minority shareholder in an appropriate and constructive manner if Clariant's management or board were to take any decision which could have eroded the value of investment made by SABIC.

30. In this regard, it would be appropriate to highlight that, often, the competitive dynamics are not influenced only by active decisions; rather, a broad understanding or awareness of the competitively sensitive information is sufficient to lead to coordinated outcomes, frustrating the process of competition. Therefore, it will be contextual to consider the conditions prescribed by way of provisos to the explanation of Item 1 Provision, which are aimed to allow the Commission to assess the minority acquisitions that are likely to cause any harm to competition.

31. Firstly, considering proviso (B) to explanation of Item 1 Provision, it is noted that the first condition prescribes therein that there be no representation of the acquirer on the board of

directors of the enterprise whose shares or voting rights are being acquired. This is meant to ensure that an acquirer with the minority shareholding does not become privy to the competitively sensitive information, access or awareness of which may be sufficient to lead to coordinated outcomes.

32. The second condition of the same proviso requires there shouldn't be a right or intention to nominate a director on the board of directors of the enterprise whose shares or voting rights are being acquired and there shouldn't be any intention on the part of the acquirer to participate in the affairs or management of the enterprise whose shares or voting rights are being acquired. The reference to 'right', i.e., an existing right captured in the transaction documents, and 'intention', i.e., a futuristic right or position, is meant to ensure that the regulatory framework is consistent with the core principle of 'substance over form'. There could be a situation where the parties can first acquire only shares and subsequently negotiate or agree for board representation or participation in management. There could also be a situation where the board seat or management participation may be a subsequent unrelated development. In cases when there is an intention to participate in management or to have board representation, the notice is required to be filed *ex-ante*, while in cases where such developments are subsequent and unrelated, the party should file the notice before giving effect to such subsequent arrangements or developments. It goes without saying that the onus to prove that the developments were subsequent to the acquisition of shares or voting rights will be on the acquirer.

33. Another condition prescribed in proviso (A) to explanation of Item 1 Provision is that the acquirer, if it wants to benefit from the application of this item, should only have the ability to exercise rights that are exercisable by the ordinary shareholder of the enterprise whose shares or voting rights are being acquired to the extent of their respective shareholding. The Item 1 Provision covers the transactions not amounting to acquisition of control and accordingly, does not differentiate between various rights, viz., investor protection rights, informational rights, etc.

34. When the facts of the instant case are examined in the above backdrop, it is observed that:

a. SABIC closed the First Acquisition on 17th September 2018 and executed the GA on the same date. This agreement granted certain rights to the Acquirer, including the right to nominate members on the board of the Target. Such rights are not available to ordinary shareholders;

b. As regards reading into the timelines, the Acquirer has contended that there has been conflation of the First Acquisition and the GA. In this regard, the parties have submitted that: (i) the entities involved in both the binding documents were different, (ii) the First Acquisition was not conditional upon the execution of the GA, and (iii) there was a lack of simultaneity. However, the timing and the terms of the GA are indicative of there always being an 'intention' on the part of SABIC to participate in the management of the Target. In fact, as any agreement is preceded by a negotiation, diligence and drafting phases, it may not be incorrect to state that moving beyond just the intention, there appears to be a proper understanding in the form of GA in this regard in the instant case; and

c. Further, the press release issued in context of the First Acquisition stated that *"the acquisition of this approximately 24.99% stake in Clariant AG will make SABIC the largest Clariant AG shareholder and represents another key milestone in SABIC's growth and diversification strategy to become the preferred world leader in chemicals"*. If the statement in this press release is read in due context of sequence of events and timelines, under the circumstances, it is fully reflective of the intent of SABIC as regards the First Acquisition.

d. Since the Acquirer has not contested the correctness of the facts contained in the press releases, the facts therein are undisputed and will remain relevant. In this regard, the submission of the Acquirer that Parties' intent can be appropriately gauged only through binding agreements between them and not through post-agreement press releases intended for other commercial purposes is not considered tenable.

35. Based on the aforesaid, it is clear that the Acquirer intended to participate in the affairs and management of the Target without ruling out the possibility that there may have been an understanding with the Target in that regard. However, even if the Acquirer's contentions were to be believed, that there was no such intention or understanding, it was incumbent on the Acquirer to approach the Commission before the implementation of the GA, which allowed the Acquirer to participate in the management or affairs of the Target.

36. SABIC had submitted that the SCN cherry-picks certain facts to fit its conclusion that the First Acquisition and the GA together required a notification to the Commission under the Act. In this regard, it may be noted that SCN is not a final determination by the Commission but only lays down the charges of contravention along with the basis and calls for response on the alleged contraveners. SCN itself is an opportunity to the Acquirer to present its case before final determination of the issues by the Commission. Apart from the written response, the Commission has also heard the Acquirer at length. Thus, the Commission sees no merit on the issue of violation of the principles of natural justice.

37. Thus, based on the analysis of the response of the Acquirer, the Commission is of the opinion that, in consummating the First Acquisition without the approval of the same by the Commission, the Acquirer has failed to file a notice for the First Acquisition in accordance with Section 6(2) of the Act, which reads as under:

> *"Subject to the provisions contained in sub-section (1), any person or enterprise, who or which proposes to enter into a combination, [shall] give notice to the Commission, in the form as may be specified, and the fee which may be determined, by regulations, disclosing the details of the proposed combination, within [thirty days] of—*
>
> *(a) approval of the proposal relating to merger or amalgamation, referred to in clause (c) of section 5, by the board of directors of the enterprises concerned with such merger or amalgamation, as the case may be;*

(b) execution of any agreement or other document for acquisition referred to in clause (a) of section 5 or acquiring of control referred to in clause (b) of that section."

Further, Section 6 (2A) of the Act reads as follows:

"*No combination shall come into effect until two hundred and ten days have passed from the day on which the notice has been given to the Commission under sub-section (2) or the Commission has passed orders under section 31, whichever is earlier."*

Accordingly, the First Acquisition attracts a 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."

38. Accordingly, in terms of Section 43A of the Act, the Commission can levy a maximum penalty of one per cent of the total turnover or the assets, whichever is higher, of such a combination. While determining the quantum of penalty, the Commission considered the following mitigating factors: (a) that there was no malafide intention to evade compliance of the provisions of the Act; (b) that there have been no previous instances where the Commission has found the Acquirer to be in violation of the provisions of the Act or the Combination Regulations; and (c) that the Acquirer has continued to co-operate with the Commission. However, the Acquirer has consummated the combination, which may be considered as an aggravating factor. In view of the foregoing, the Commission considered it appropriate to impose a penalty of INR 40,00,000 (Indian Rupees Forty Lakh only) on the Acquirer. The Acquirer is directed to pay the penalty within sixty days from the date of receipt of this order.

39. The Secretary is directed to communicate to the Acquirer accordingly.