COMPETITION COMMISSION OF INDIA

19th 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**'), a wholly owned affiliate of Saudi Basic Industries Corporation ('**SABIC**'), under Section 43A of the Competition Act, 2002 ('**Act**'), in relation to its acquisition of additional 6.51% shareholding of

Clariant AG ('**Clariant**'/'**Target**') through a series of open market purchases on the SIX Swiss Exchange and via electronic trading platforms ('**Combination**'/'**Second Acquisition**'), in pursuance of the show cause notice dated 30th September 2020 ('**SCN**') [Hereinafter, SABIC and SABIC B.V. are used interchangeably]. The said Combination was notified to the Competition Commission of India ('**Commission**') by SABIC B.V. in Combination Registration No. C-2020/05/746. The said notification ('**Notice**') was given by SABIC B.V. on 29th May 2020 under Section 6(2) of the 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**').

A. Background

2. The Notice was filed pursuant to the board resolution passed by SABIC B.V. on 13th January 2020 ('**Board Resolution**'), as per which the Acquirer envisaged the Combination via escrow mechanism. Accordingly, the Acquirer executed a Share Escrow and Control Agreement dated 13th January 2020 ('**Escrow and Control Agreement**') with an individual acting as independent third party ('**Principal 2**') and Credit Suisse (Schweiz) AG ('**CS**') (for acting in the capacity of an '**Escrow Agent**' and a '**Custodian**').

3. Clariant's shares were acquired on the SIX Swiss Exchange by Credit Suisse Securities (Europe) Limited ('**CS Europe**') on behalf and on account of SABIC. According to the terms of the Escrow and Control Agreement, any shares in Clariant that CS Europe acquired in the market ('**Escrow Shares**') were required to be credited into a securities account opened in the name of SABIC with the Custodian ('**Securities Account**').

4. Accordingly, the process of acquisition of shares of the Target and placement of these in the Escrow Account began on 13th January 2020 and was completed on 27th February 2020. The Escrow and Control Agreement provided that the Escrow Shares could only be released to SABIC upon receipt of all merger clearances.

5. Following the completion of this acquisition of 6.51% shareholding of the Target via escrow mechanism, the Acquirer filed the Notice with the Commission. It was stated in the Notice that the Acquirer already held shareholding equivalent to 24.99% of the capital of the Target ('**First Acquisition**') prior to the passing of the Board Resolution and the execution of the Escrow and Control Agreement. Post the completion of the Second Acquisition, the total shareholding of the Acquirer in the Target has increased to 31.5%.

6. During the course of review of the Combination, the Acquirer made additional voluntary submission on 17th June 2020 and 22nd June 2020, and the Commission also issued two letters to the Acquirer in terms of Regulation 14 of the Combination Regulations on 22nd June 2020 and 5th August 2020, wherein the Acquirer was, *inter alia*, required to provide certain details about the escrow mechanism. The Acquirer provided its response *vide* letters dated 17th July 2020, 14th August 2020 and 21st August 2020.

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

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

8. In terms of Section 6(2) of the Act, an enterprise which proposes to enter into a combination is required to give a notice to the Commission, disclosing the details of the proposed combination, within thirty days of the execution of any agreement or other document for acquisition. Further, as per Section 6(2A) of the Act, no combination shall come into effect until 210 days have passed from the day on which the notice has been given to the Commission under Section 6(2) or the Commission has passed an order under Section 31 of the Act, whichever is earlier. The Central Government, in exercise of the powers conferred by Clause (a) of Section 54 of the Act, in public interest, has exempted every person or enterprise who is a party to a combination as referred to in Section 5 of

the Act from giving notice within thirty days mentioned in Section 6(2) of the Act, subject to the provisions of Section 6(2A) and Section 43A of the Act.

9. The Commission, in its meeting held on 2nd September 2020, noted that additional acquisition of 6.51% of Clariant's equity shares by SABIC has been made pursuant to the escrow mechanism. The non-exercise of voting rights for a limited period of time with respect to the acquisition of 6.51% of Clariant's equity shares is a self-imposed contractual obligation taken upon by the Acquirer. It further noted that the Act and Combination Regulations do not exempt a situation wherein a buyer acquires shares but decides not to exercise legal/beneficial rights in them from the purview of the provisions of the Act in general and Section 43A of the Act in particular. In the light of the aforesaid, the Commission observed that, *prima facie*, such acquisition amounts to consummation of Combination prior to giving the notice in terms of Section 6(2) of the Act, thereby contravening the provisions of Section 6(2) of the Act. Accordingly, the Commission issued SCN under Section 43A of the Act read with Regulation 48 of the Competition Commission of India (General Regulations), 2009 ('**General Regulations**') on 30th September 2020. The Acquirer filed its response to the SCN on 1st December 2020 after seeking an extension of time ('**Response to SCN**').

10. 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

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

I. The Combination was not consummated by the Acquirer without the Commission's approval in violation of Section 6(2) of the Competition Act

12. It was submitted that, under the applicable Swiss law, the acquiring enterprise is specifically required to register the shares acquired over the Swiss stock exchange with the relevant listed entity for it to secure and exercise voting rights in relation to the acquired shares. Unlike legal ownership in the shares, which is transferred to the acquirer upon acquisition of the shares, the voting rights in the shares of a listed Swiss entity are not automatically transferred to the acquirer, and an acquirer is thus not automatically able to exercise such voting rights.

13. The terms of the Escrow and Control Agreement, which were in line with the provisions of Swiss Law, prohibited SABIC/Acquirer from applying for registration as a shareholder with voting rights in the share ledger of Clariant with respect to the Escrow Shares until all the merger clearances were obtained. Further, the Escrow Shares were irrevocably locked with the Custodian. Therefore, in any event, the Acquirer could not have registered the Escrow Shares with Clariant.

14. Since the Escrow Shares purchased by the Acquirer did not carry any voting rights, the transaction does not qualify as an acquisition of "shares" as defined under Section 2(v) of the Act. The Acquirer's agreement prior to purchase of any shares and placing the same in the Escrow Account also demonstrates that the Acquirer acted in good faith to make consummation of the Combination impossible until all merger control clearances were duly obtained. Accordingly, the Acquirer ensured that the structure as well as the substance of the Combination and the Escrow and Control Agreement complied with the provisions of the Act.

15. Accordingly, although the Acquirer was the legal owner of the Escrow Shares, the Escrow and Control Agreement ensured that the Acquirer had no right to give any instructions to the Escrow Agent concerning the Escrow Shares unless the Acquirer was able to

unequivocally demonstrate that it had obtained all merger clearances. Further, the Custodian of the Escrow Shares also did not take instructions from the Acquirer.

16. With respect to the dividend rights, it was submitted that the Escrow and Control Agreement provided for an obligation to the Custodian to transfer any dividend paid on the Escrow Shares to a blocked account (i.e., an account opened with the Custodian in the name of SABIC) but was instructed not to transfer any dividend payment to the Acquirer as long as the Escrow Shares were blocked on the escrow account.

17. In the absence of the Commission's approval, the Escrow Shares would have been automatically sold in the open market by Principal 2 without any consent required from SABIC or any possibility of SABIC to prevent the sale of the shares in the open market.

18. Accordingly, in the absence of the ability to apply for registration of and exercise voting rights in relation to the Escrow Shares, the acquisition of the Escrow Shares by the Acquirer in and of itself did not result in any additional influence of the Acquirer on Clariant. Rather, the Acquirer's influence on Clariant remained unaffected by the acquisition of the Escrow Shares. Therefore, Clariant and the Acquirer continued and will continue to act independently from each other and in the ordinary course of business, prior to receipt of all the merger clearances, and did not give effect to or take any steps to give effect to the Combination.

19. The Acquirer submitted that the Combination was planned to specifically ensure compliance with the provisions of the Competition Act. The Acquirer was required to: (i) adhere to the standstill obligations as required under Section 6(2A) of the Competition Act; and (ii) not give effect to or consummate the Combination until receiving the Commission's approval. In this regard, it submitted that it did not give effect to or consummate the Combination prior to the Commission's approval order dated 2nd September 2020 and adhered to the standstill obligations, which are substantively reflected in the structure of the Combination and the Escrow and Control Agreement.

II. Applicability of Swiss laws with respect to the Escrow and Control Agreement and the legal test laid down by the Supreme Court in SCM Soilfert to the Combination.

20. The Acquirer submitted that under Swiss law, even for share acquisitions over a stock exchange (such as the Combination), the registration of shares with the company is mandatory to exercise voting rights. For as long the relevant company (in this case, Clariant) has not recognised the acquirer (i.e. SABIC) as a shareholder of the company in relation to the Escrow Shares and registered the acquirer in the share ledger of the company, the acquirer does not acquire and cannot exercise the voting rights in relation to the shares acquired. It is also submitted that, given that registration is not mandatory under Swiss law, some shareholders do not apply for such registration in the share register until there is an upcoming extraordinary or annual general meeting.

21. Therefore, contrary to the facts in SCM Soilfert, which is the basis of the SCN, the Acquirer was not a recognised shareholder of the Escrow Shares and can thus not be said to have consummated the Combination prior to giving notice to the Commission.

III. Disclosures in financial statements by the Acquirer

22. The SCN has relied on SABIC's financial statement disclosures (Q2 report), which stated that *"although the completion of the transaction is still subject to regulatory approvals, as a major shareholder, SABIC has recognized this additional acquisition as part of the current interest in Clariant, increasing to 31.5%".* In this regard, it was submitted by the Acquirer in Response to SCN that its Q3 interim results published on 29th October 2020, *inter alia,* clarified that the accounting treatment adopted in the Q2 report published in March was a technical choice and the recognition of the additional acquisition of 6.51% was disclosed on the basis of appropriate accounting standards, including the International Financial Reporting Standards.

23. Further, with respect to SCN's interpretation of the statement on the Acquirer's significant influence over Clariant reported in the SABIC's Q2 financials, the Acquirer submitted that the said disclosure does not relate to the transaction in question, as the said disclosure

was made in accordance with IFRS provisions in relation to the Acquirer's existing 24.99% shareholding in Clariant, prior to and unrelated to the Combination.

24. Further, it is submitted that the SCN has failed to provide any evidence, apart from relying on its decision in SCM Soilfert, to reach a *prima facie* conclusion that the Acquirer gave effect to or consummated the Combination pending the Commission's approval. The Acquirer submits that the SCN is premeditated and also assumed the outcome of the proceedings which are pending before it. The duty imposed upon the Commission by the provisions of Section 36(1) of the Competition Act, lays down that *"(i)n the discharge of its functions, the Commission shall be guided by the principles of natural justice"*.

D. Analysis of the submissions of the Acquirer

25. Having considered the written and oral submissions of the Acquirer, the Commission proceeds to determine whether the acquisition of the Escrow Shares prior to giving the Notice, had the impact of consummating the Combination and the Acquirer has failed to file a notice in terms of Section 6(2) of the Act.

26. At the outset, the Commission considered and decided on an issue involving acquisition of shares and placing the same in escrow account in its decision in *SCM Soilfert Limited*[1] ('**SCM Soilfert Decision**'). The same has been referred in the SCN issued by the Commission and also the Response to SCN submitted by SABIC. It would be appropriate to refer the same before going into an examination of each of the submissions of SABIC. The Commission in SCM Soilfert Decision noted,

> *"…As already stated above, the Second Acquisition is part of the Proposed Combination. The decision to keep the acquired shares in an escrow account maintained with the escrow agent and to not exercise any beneficial interest, including voting rights, with respect to the Second Acquisition was that of the Acquirers and not due to any statutory requirement in this regard. Further, the Act*

[1] Order of the Commission under Section 43A of the Act dated 10th February 2015 in relation to Notice given under Section 6(2) of the Act by SCM Soilfert Limited: Combination Regn. No. C-2014/05/175

and Combination Regulations do not exempt a situation wherein a buyer acquires shares but decides not to exercise legal/beneficial rights in them, from the purview of the provisions of the Act in general, and Section 43A of the Act, in particular. Therefore, the Acquirers' contention that the Second Acquisition was not consummated, as the shares were kept in an escrow account and they were not entitled to exercise any legal or beneficial rights over them till approvals of regulatory bodies are obtained, is not tenable under the law..." (emphasis supplied).

27. The aforesaid issues were also considered by the Hon'ble Supreme Court of India in the same matter[2]. The appellants in the SCM Soilfert Case argued,

"...the equity shares purchased second time were placed in the Escrow Account. The appellants could not have exercised the beneficial rights until the Commission made the approval of the proposed combination. What was essential under section 2(e) was the voting rights and the appellants could not have exercised voting rights by placing shares in the escrow account."

28. The Hon'ble Supreme Court observed, *inter alia*,

"We find no merits in the submissions raised. It is apparent from section 6(2) of the Act that the proposal to enter into combination is required to be notified to the Commission. The legislative mandate is apparent that the notification has to be made before entering into the combination."

"When the transaction has been completed and acquisition has been made and the latter transaction has exceeded holding more than 25% by the second purchase, obviously prior permission was required, as discussed hereinabove, as its total shareholding increased to 25.3%. Thus, we have no hesitation to hold that the notification under section 6(2) of the Act has to be ex-ante".

[2] Civil Appeal No. 10678 of 2016

29. In the subsequent section, the Commission has considered and determined on all the submissions of the Acquirer, including those on the substantive issues raised in the SCN as identified above and other submissions of the Acquirer.

I. Consummation of Combination resulting in violation of Section 6(2) of the Act; applicability of the legal test laid down by the Supreme Court in SCM Soilfert Decision and applicability of the Swiss laws with respect to the Escrow and Control Agreement

30. The Acquirer has principally based its submissions upon the clauses of Swiss Code of Obligations regarding the requirement of registration and consequent non-availability of voting rights in the absence of registration to substantiate its claim that there was no requirement to give a Notice to the Commission and take prior approval before the acquisition of the Escrow Shares.

31. The SCM Soilfert Decision of the Commission, which was upheld by the Competition Appellate Tribunal ('**COMPAT**') and the Hon'ble Supreme Court of India have clearly established the decisional practice that the acquisition of shares via escrow mechanism cannot be permitted without prior approval of the Commission in an *ex-ante* merger review regime. Based on this, the parties were asked in the SCN to respond on the SCM Soilfert Decision.

32. The Acquirer has attempted to distinguish the present transaction with the SCM Soilfert transaction.

33. Firstly, it has submitted that acquisition of shares without voting rights are not shares, and hence, the transaction is not a combination. This argument of the Acquirer is not tenable as it may be noted that the definition of shares as given under Section 2(v) emphasises the entitlement of voting rights to differentiate shares from other securities which do not carry voting rights and do not in any manner indicate that voluntary suspension of the voting rights of a share which carries voting rights will cease to be considered a share. Further, the same issue of essentiality of voting rights for constituting the 'shares' was made before the Hon'ble Supreme Court of India as well, as referred in the para above, and the Hon'ble

Supreme Court of India had not found any merit in the same, as referred to in paragraphs 27 and 28 above.

34. Secondly, the Acquirer has attempted to differentiate a situation where voting rights are absent due to a provision in law as against their absence due to suspension via self-imposed contractual obligations.

35. In this regard, the arguments of the Acquirer are not found to be tenable because of the following:

(i) Substantively, there is no difference between putting the shares in an escrow account or not registering the same and consequently not securing voting rights. In this regard, the Commission in its SCM Soilfert Decision noted that the decision to keep the acquired shares in an escrow account maintained with the escrow agent and not exercise any beneficial interest, including voting rights, is that of the acquirer, and not due to any statutory requirement. It was clearly stated that the Act and Combination Regulations do not exempt a situation wherein a buyer acquires shares but decides not to exercise legal/beneficial rights in them, from the purview of the provisions of the Act in general, and Section 43A of the Act in particular. How the rights are suspended, whether by the escrow mechanism or by non-registration of shares (or both) is inconsequential to the outcome, which substantively is acquisition of shares prior to filing of notification.

(ii) The only difference which has been highlighted by the Acquirer to differentiate the instant case from the SCM Soilfert case is the requirement of registration and consequent non-availability of voting rights in the absence of registration. In this regard, it has been observed that non-registration is a voluntary act just like the escrow mechanism and does not take anything away from the fact that neither the Combination Regulations nor any other statutory requirement necessitates the acquiring enterprise to abstain from exercising any legal or beneficial rights accrued from the acquired shares, and therefore, the distinction has no merit. In fact, in the absence of the requirement of registration, the issue of essentiality of voting rights

has also been discussed for constituting the acquisition of shares and not found relevant in the SCM Soilfert Decision.

(iii) The Acquirer in the present case has presented similar arguments as presented by the acquirers in the SCM Soilfert case, i.e., they had entered into an escrow agreement as a result of which, they were not entitled to exercise legal and beneficial rights accruing to acquired shares which had been credited to the escrow account, until the approval of the Commission. The Hon'ble Supreme Court of India, while finding no merits in such arguments of the acquiring enterprise, also took a similar view and held that the Act requires the notices to be filed under Section 6(2) of the Act prior to the consummation of the combination as it envisages an *ex–ante* analysis to be carried out by the Commission.

(iv) In regard to the facts of the aforementioned judgment of the Hon'ble Supreme Court of India, it was also held that, as the acquisition of escrow shares would increase the shareholding of the acquiring enterprise to above the 25% threshold, the notice should have been filed prior to the acquisition of the shares. With the juxtaposing of the ratio decidendi of this judgment to the case at hand, it becomes unambiguous that the Acquirer ought to have notified the Combination to the Commission before acquiring the Escrow Shares. Thus, the self-imposed obligations of the Acquirer do not have any effect on the consummation of the Combination in the eyes of the Act or the Combination Regulations.

(v) Irrespective of whether the Acquirer is in a position to exercise control/rights over the Escrow Shares, it is nonetheless vested with the legal and beneficial ownership of the Escrow Shares, which is clear from the reading of Clause 4.2.2 of the Escrow and Control Agreement, which provides that,

"During the effectiveness of the Escrow and Control Agreement, the ownership in the Escrow Shares (legal and beneficial) is and shall remain with Principal 1." (Principal 1 being the Acquirer)

The above is sufficient to consider acquisition of shares as a 'Combination' under Section 5 of the Act, hence triggering the onus on the Acquirer to notify the transaction to the Commission and take approval prior to acquiring the shares via escrow mechanism.

36. The observations of the Commission in SCM Soilfert Decision and the observations of the COMPAT and Hon'ble Supreme Court of India elucidate the position of law in cases involving acquisition of shares through the escrow mechanism in no uncertain terms. The facts of the instant case are no different from the facts in the SCM Soilfert Case. The Commission observed in this regard that the submissions of the Acquirer are misplaced and not tenable.

II. Various disclosures made by the Acquirer

37. The Acquirer has objected to the Commission relying on the statements made in the Press Release and accounting statements. In this regard, it is important to note that the fact of acquisition of equity shares is undisputed as well as the notification requirements are undisputed, as is clear from the Acquirer filing the notice of its own volition. Considering the aforesaid, the statements made in the Press Release and accounting statements have been relied upon as the Commission was seized with the matter of contravention of Section 6(2) of the Act both for the First Acquisition (separate issue being dealt by way different proceedings) and the Second Acquisition. The limited relevance of these statements was to understand the overall circumstances of acquisition of shares by the Acquirer of the Target. These references are inconsequential to the instant case because there is no dispute about the notifiability of the transaction via escrow mechanism.

38. It is further observed 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 contravention of the provisions of the Act. The 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.

39. Albeit the Acquirer has prayed that if the Commission considers the conduct of the Acquirer to be in violation of the provisions of the Act, it shall be deemed to be a technical breach. Nevertheless, based on the analysis of the response of the Acquirer, the Commission is of the opinion that there has been a consummation of the Combination before the approval of the same by the Commission and the Acquirer has failed to file a notice for the Combination in accordance with Section 6(2) of the Act, which reads as following:

> *"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."*

Accordingly, it 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."*

40. 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 mala fide intention to evade compliance of the provisions of the Act; (b) parties had voluntarily given notice under Section 6(2) of the Competition Act; and (c) parties had co-operated with the Commission. In view of the foregoing, the Commission considered it appropriate to impose a penalty of INR 5,00,000 (Indian Rupees Five Lakh only) on the Acquirer, as a fine for violation of standstill obligations without filing of notice under Section 6(2) of the Act.

41. The Acquirer is directed to pay the penalty within sixty (60) days from the date of receipt of this order.

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