

CCI PENALISES ADANI GREEN ENERGY AND TATA POWER COMPANY FOR GUN-JUMPING

1. INTRODUCTION

- 1.1. The Indian merger control regime is mandatory and suspensory; therefore, if a combination (or a part thereof) is notifiable to the Competition Commission of India (“CCI”), the parties cannot consummate the combination or any part thereof prior to receiving approval of the CCI or until the lapse of 210 days from the date of notification of the combination.¹ The act of the parties to consummate a notifiable transaction (in full/ part) without prior approval of the CCI (or until the lapse of 210 days from the date of notification) is popularly referred to as ‘gun-jumping’. As such, Section 43A of the Competition Act, 2002 (“**Competition Act**”) empowers the CCI to impose a penalty of up to 1% of the combined asset value or turnover of ‘combination’ (whichever is higher) on the acquirer, for gun-jumping/ failure to notify a notifiable combination.
- 1.2. After almost 2 years of a pandemic induced hiatus, the CCI has recently taken cognizance of gun-jumping and imposed penalties of INR 5 lakhs (approximately USD 6,600)² and INR 15 lakhs (approximately USD 19,700)³ on Adani Green Energy Limited (“**AGEL**”) and Tata Power Company Limited (“**TPCL**”), respectively. By way of its penalty orders, the CCI also provided: (i) clarifications regarding notifying a ‘combination’ to the CCI which is also governed by the Electricity Act, 2003 (“**Electricity Act**”); and (ii) guidance regarding conduct or arrangements which may violate the standstill obligations⁴ under the Competition Act.

2. Acquisition by AGEL⁵

- 2.1 On May 20, 2021, AGEL filed a notice with the CCI regarding its acquisition of the entire equity stake of S.B. Energy Holding Limited (“**SBEHL**”) (hereinafter referred to as the ‘**Combination**’), pursuant to execution of a share purchase agreement dated May 18, 2021 (“**SPA**”) with Softbank Group Capital Limited (“**Softbank**”), which was subsequently approved by the CCI, on June 30, 2021.
- 2.2 During its review of the Combination, the CCI observed that the SPA contained a clause that: (i) allowed AGEL and Softbank to discuss the ongoing business and operations of SBEHL and its subsidiaries; (ii) allowed AGEL to provide inputs on the business of SBEHL; and (iii) obliged SBEHL to take such inputs in the best interest of itself and its subsidiaries (“**Impugned Clause**”). The CCI *prima facie* found the scope of the Impugned Clause to be broader than what had been stated by AGEL in its notice, as it envisaged discussions on the “*on-going business and operations of the target*”. Accordingly, on August 14, 2021, the CCI issued a show cause notice (“**SCN**”) to AGEL for gun-jumping.

¹ Section 6(2A) of the Competition Act.

² Converted at 1 USD = INR 76.

³ Converted at 1 USD = INR 76.

⁴ Standstill obligations essentially require that the parties carry on with their ordinary course activities completely independent of each other till the time the transaction is reviewed for any appreciable adverse effect on competition and approved by the CCI.

⁵ Order available at: https://www.cci.gov.in/sites/default/files/Notice_order_document/Order837_43A.pdf.

- 2.3 AGEL submitted that the primary consideration for such exchange of information pursuant to the Impugned Clause is: (i) to monitor and preserve the economic value of SBEHL between signing and closing; and (ii) to take stock of any material developments that have affected the business of SBEHL. Further, AGEL had put in place safeguards in the SPA such as: (a) the information exchange would take place by way of a 'clean team'; and (b) ensuring that the inputs provided by AGEL were non-binding in nature.
- 2.4 As such, the CCI recognised the importance and inherence of information exchange between the parties at various stages of a transaction⁶ and reiterated that a balance should be maintained between legitimate exchange of information and the concerns of gun jumping. The CCI clarified that while undertaking gun-jumping assessment, it considers the likelihood of the conduct or arrangement: (i) to infringe with ordinary course activities of the parties; or (ii) to lead to a reduction in the competition intensity; or (iii) to have the potential of causing competition distortions *inter-alia* by way of: (a) the acquirer gaining a strategic advantage over the target enterprise; (b) reducing the incentive and will of the target enterprise to compete with the acquirer; and (c) creating situations similar to tacit collusion. Such likelihood is weighed in terms of the inherence-proportionality test and the efficacy of the safeguards put in place to avoid any adverse effect on competition.
- 2.5 In the present case, the CCI observed that the Impugned Clause cannot be considered to be inherent or proportional to the objective of preserving the economic value of SBEHL as it explicitly brings discussion on 'business and operations' in its scope.⁷ Further, the safeguards contained in the SPA were insufficient to ensure that the standstill obligation was adhered to in letter and spirit as: (i) the clean team of AGEL could not have provided 'inputs' to SBEHL on their own; and (ii) such inputs would have necessarily been shared with the management of SBEHL. Additionally, the CCI observed that the SPA already contained clauses that aimed to preserve the economic value of SBEHL. Hence, the CCI concluded that the Impugned Clause cannot be considered a legitimate exchange of information to preserve the economic value of SBEHL.
- 2.6 In view of the above, the CCI held that that the Impugned Clause, by itself, amounts to part consummation of the Combination prior to receiving the CCI's approval and hence, violates the standstill obligation under the Competition Act. Given the various aspects surrounding issue of information exchange during the course of a transaction, the CCI deemed it more important to raise awareness amongst the stakeholders regarding standstill obligations in general and information exchanges in particular. Accordingly, the CCI imposed a nominal penalty of INR 5 lakhs (approximately USD 6,600)⁸ on AGEL.

⁶ During the due diligence stage, the focus of information exchange is on information which facilitates the assessment of the suitability of the target enterprise for the acquirer (i.e., whether the target enterprise fits in the business strategy of the acquirer and for the purpose of valuation of the target enterprise). On the other hand, the focus of the information exchange after execution of transaction documents shifts more towards ensuring the preservation of economic value of the target enterprise and to undertake integration planning.

⁷ Such discussions and consequent inputs by AGEL may lead to the parties ceasing to act independently or ceasing to compete as the parties were competing before the combination and result in a situation of tacit collusion with a competitor.

⁸ Converted at 1 USD = INR 76.

3. Acquisitions by TPCL⁹

- 3.1 On March 30, 2021, TPCL filed three separate notices with the CCI regarding its acquisition of 51% of equity stake of: (i) Western Electricity Supply Company of Orissa Limited (“WESCO”); (ii) Southern Electricity Supply Utility of Odisha Limited (“SOUTHCO”); and (iii) Central Electricity Supply Utility of Orissa (“CESU”) (WESCO, SOUTHCO and CESU collectively referred to as the “Targets”), which was subsequently approved by the CCI, on June 7, 2021.
- 3.2 During its review of the combinations, the CCI observed that in the financial years 2016-17 and 2020-21, the Odisha Electricity Regulatory Commission (“OERC”) initiated a bidding process for the sale of 51% of the equity stake of the Targets, whereby TPCL participated and was selected as the successful bidder. Pursuant to its selection by the OERC, TPCL and OERC entered into a letter of intent (“LOI”), which required TPCL to comply with strict conditions¹⁰ and timelines regarding the consummation of acquisition of the Targets. TPCL fulfilled these conditions and consummated the acquisition of the Targets prior to notifying the acquisitions to the CCI and obtaining its approval. Thus, the CCI *prima facie* observed that TPCL filed a belated notice (i.e., post the consummation) with the CCI. Accordingly, on July 5, 2021, the CCI issued a SCN to TPCL for gun-jumping.
- 3.3 TPCL *inter-alia* submitted that: (i) the present acquisitions were different from a typical commercial transaction as they are entirely regulated by the OERC under the provisions of Section 20 of the Electricity Act;¹¹ (ii) the OERC had the exclusive jurisdiction to regulate ‘combinations’ in the electricity sector; and (iii) a special law (i.e., the Electricity Act) will prevail over the general law (i.e., the Competition Act) in case of any apparent conflict between the two.
- 3.4 The CCI based on its decisional practice¹² held that the OERC did not have exclusive jurisdiction over the acquisition of the Targets under the Electricity Act and that TPCL was obliged to notify such acquisitions to the CCI, after the issuance of the LOI but before consummation. Additionally, the CCI observed that the OERC (by way of a letter sent to TPCL), expressly recognized the CCI’s jurisdiction regarding regulating combinations in the electricity sector and directed TPCL to comply with the provisions of the Competition Act. Thus, the CCI concluded that TPCL failed to notify its acquisition of the Targets in a timely manner. However, given the mitigating factors, such as, cooperation extended by TPCL and the obligations imposed by the OERC, the CCI imposed a nominal penalty of INR 5 lakhs (approximately USD 6,600)¹³ on TPCL for each acquisition, cumulatively amounting to INR 15 lakhs (approximately USD 19,700).¹⁴

⁹ (i) TPCL acquisition of Western Electricity Supply Company of Orissa Limited, order available at: https://www.cci.gov.in/sites/default/files/Notice_order_document/C-2021-03-824Order.pdf; (ii) TPCL acquisition of Southern Electricity Supply Utility of Odisha Limited, order available at: https://www.cci.gov.in/sites/default/files/Notice_order_document/C-2021-03-825Order.pdf; and (iii) TPCL acquisition of Central Electricity Supply Utility of Orissa, order available at: https://www.cci.gov.in/sites/default/files/Notice_order_document/C-2021-03-826Order.pdf.

¹⁰ Pursuant to the issuance of LOI, TPCL was required to: (i) make payment of guarantee; (ii) deposit the consideration amount; and (iii) execute the transaction documents, within 30 days from the issuance of the LOI.

¹¹ Section 20 of the Electricity Act empower the Appropriate Electricity Regulatory Commission (in this case, the OERC) to select the bidder and vest the entities with the winning bidder in terms of Section 21 of the Electricity Act.

¹² Case No. 39 of 2019, *HPCL-Mittal Pipelines Limited v. Gujarat Energy Transmission Corporation Limited and others*; Case No. 43 of 2017, *Arun Mishra v. State of Uttar Pradesh and others*; Case No. 06 of 2009, *Neeraj Malhotra vs. North Delhi Power Limited and others*.

¹³ Converted at 1 USD = INR 76.

¹⁴ Converted at 1 USD = INR 76.

4. **INDUSLAW VIEW**

- 4.1 In the recent years not only is India witnessing robust M&A activity, but the parties are also increasingly putting in place inventive arrangements to protect the value of the target enterprise and their investment. While such interim arrangements are important, the Competition Act calls upon the parties to ensure that such arrangements should not have the effect of consummating the combination (in whole/ part) prior to obtaining the CCI's approval. However, there are no guidelines or bright line tests enumerating actions/ arrangements which would constitute gun-jumping. Hence, in the absence of such guidelines, parties rely heavily on the penalty orders of the CCI for guidance.
- 4.2 The AGEL penalty order is of particular importance as it provides an insight into the evaluation process of the CCI, which will enable the parties to undertake a self-assessment of their proposed interim conduct or arrangements and examine if they may amount to violation of the standstill obligations. This order also gains prominence as it elaborates the permissible scope of information that can be exchanged between the parties during a combination.

Authors: Avimukt Dar | Unnati Agrawal | Parth Sehan

Practice Areas: Competition Law

Date: May 04, 2022

DISCLAIMER

This article is for information purposes only. Nothing contained herein is, purports to be, or is intended as legal advice and you should seek legal advice before you act on any information or view expressed herein.

Although we have endeavored to accurately reflect the subject matter of this alert, we make no representation or warranty, express or implied, in any manner whatsoever in connection with the contents of this alert.

No recipient of this article should construe this article as an attempt to solicit business in any manner whatsoever.