

Trends in Gun-Jumping: CCI on a Gun-Jumping Spree

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With the expansion of the Indian economy, and as corporate transactions come back to pre-Covid levels, the Indian competition authority (Competition Commission of India (“CCI”)) is back to tackling gun-jumping issues with renewed fervor. Statistical analysis reveals that gun-jumping fines under Section 43A of the Competition Act, 2002 (Competition Act) were imposed in over 11 cases through the year, and the penalties ranged from INR 5 lakh² (~USD 6,131.20³) to INR 1 crore⁴ (~USD 122,624.2), totaling to INR 2.55 crore (~USD 312,691.60). The average penalty imposed by the CCI for gun-jumping over the course of the year was ~INR 23 lakhs (~USD 28,203.56). Contrasting this from the previous year, the CCI issued orders and imposed fines in only two cases.⁵

A closer look at the orders issued by the CCI under Section 43A of the Competition Act indicate that “*open-market purchases*” dominated the landscape of gun-jumping fines. Nearly 50 percent⁶ of the orders issued by the CCI involved gun-jumping by the parties through “*open-market purchases*” resulting in partial / complete consummation of the transaction prior to receipt of CCI approval. In this article, we will examine key CCI decisions involving market purchases and flesh out the major takeaways that can impact deal values.

I. Background

The merger control regime in India is suspensory in nature. Accordingly, parties to a proposed combination are required to ensure that standstill obligations are maintained and the proposed combination is not consummated (either in part or full) prior to receipt of CCI approval to avert penalty under Section 43A of the Competition Act.⁷ While the quantum of penalty that can be imposed by the CCI under Section 43A is high (going up to 1 percent of the total turnover or assets, whichever is higher), the CCI has been cautious and measured in its approach and has levied reduced fines.

II. Open-Market Purchases: Straight Road to Gun-Jumping

As set out above, “*open-market purchases*” was the unifying theme in most of the gun-jumping fines imposed last year.⁸ Pertinently, in almost all of the aforementioned cases the parties had acquired rights not available to an ordinary shareholder such as, among others, the right to appoint / nominate directors to the board of the target entity (*SABIC International Holdings B.V. / Trian Partners AM Holdco, Ltd / PI Opportunities Fund-I*). Additionally, in a few cases the parties had already consummated the

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² Ref: (i) Adani Green Energy Limited (Combination No: [C-2021/05/837](#), order under Section 43A dated March 9, 2022); and (ii) Tata Power Company (Combination No(s): [C-2021/03/824](#); [C-2021/03/825](#); [C-2021/03/826](#), orders under Section 43A dated March 17, 2022).

³ The USD to INR conversion is based on the exchange rate of 1 USD = 81.55 INR (calculated on the basis of the average spot rate published by the RBI for the six months preceding January 16, 2023, available at: <https://www.fbil.org.in/#/home>).

⁴ Ref: [Veolia Environnement S.A.](#) (order under Section 43A dated May 17, 2022).

⁵ Ref: (i) [Investcorp India Asset Managers Private Limited](#) (order under Section 43A dated December 17, 2021); and (ii) [Amazon.com NV Investment Holdings LLC](#) (order under Section 43A dated December 17, 2021).

⁶ Ref: (i) PI Opportunities Fund-I and Pioneer Investment Fund (Combination No: [M&A/Q1/2018/18](#); order under Section 43A dated September 30, 2022); (ii) Trian Partners AM Holdco Limited and Trian Fund Management, L.P. (Combination No: [C-2021/01/810](#); order under Section 43A dated September 30, 2022); (iii) SABIC International Holdings B.V. (Combination No: C-2020/05/746; orders under Section 43A dated [July 15, 2022](#) and [July 19, 2022](#)); and (iv) [Veolia Environnement S.A.](#) (order under Section 43A dated May 17, 2022).

⁷ Section 43A of the Competition Act states: “*Power to impose penalty for non-furnishing of information on combinations: 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 combination.*”

⁸ Ref: (i) Trian Holdings (Combination No: [C-2021/01/810](#), order under Section 43A dated September 30, 2022); (ii) SABIC (Combination No: C-2020/05/746, orders under Section 43A dated [July 15, 2022](#); [July 17, 2022](#)); and (iii) PI Opportunities Fund-I and Pioneer Investment Fund (Combination No: [M&A/Q1/2018/18](#); order under Section 43A dated September 30, 2022).

initial transaction (which was not reported), and only then approached the CCI for the follow-on / step-up transaction (*SABIC International Holdings B.V. / Trian Partners AM Holdco, Ltd / PI Opportunities Fund-I*). While assessing the merger notifications filed by the parties, the CCI examined underlying transaction documents to unearth the intent of the parties and observed that they had failed to seek approval for the initial transaction(s). This resulted in the CCI issuing warning letters to the parties.

Several other intriguing and common facets have emerged from the examination of gun-jumping orders issued by the CCI. A few key themes are discussed below:

A. Ordinary Course of Business / Solely as an Investment

In many of the cases reviewed, the CCI examined the applicability of the Item I Exemption⁹ in the context of director appointment rights. For example, in *PI Opportunities Fund*¹⁰ (“*PI Case*”), the transaction involved the acquisition of 6.03 percent shareholding in Future Retail Limited (Target) by Pioneer Investment Fund and PI Opportunities Fund-I (collectively, “Acquirers”) through a series of open-market transactions (as a block deal) from Cedar Support Services Limited (“Seller”) (the transaction being, “Transaction”) on 6 June 2018. Subsequently, on June 11, 2018, the Target invited the Acquirers to nominate a director on its board of directors.

The Acquirers argued that the Transaction was eligible for the Item I Exemption since it was undertaken during the ordinary course of business. Rejecting the contentions of the Acquirer, the CCI remarked that the transaction could not be seen “solely as an investment” since: (a) the Acquirers had the right to nominate a director on the board of the Target; and (b) the timeline between execution of the transaction documents and the invitation by the Target indicated that the Acquirers sought to

participate in the affairs and management of the Target. Going a step further, the CCI also remarked that the benefit of “ordinary course of business” was also not available, given that the Acquirers had considered the Transaction to be an “investment,” thereby negating the applicability of the “ordinary course of business” leg of the Item I Exemption.

Similar flavor can be evinced from the CCI’s decision in *Trian Partners AM Holdco*.¹¹ The transaction involved two consecutive market purchases (undertaken within a short timeframe of ~4 months i.e. between June 2020 and September 2020) by Trian Partners AM Holdco, Ltd and Trian Fund Management L.P. (collectively, “Trian”) leading to the acquisition of 9.9 percent shareholding (“Acquisition”) in Invesco Limited (“Invesco”). As a result of the Acquisition, Trian also obtained the right to nominate two individuals to the board of the Target. Curiously, while Trian did not notify the Acquisition to the CCI, it approached the CCI for approval for a follow-on acquisition, which would result in Trian holding more than 10 percent of the equity share capital of the Target.

While Trian argued that the Acquisition could claim the benefits of the Item I Exemption, the CCI reiterated its observations in the *PI Case* stating that the Acquisition could not be classified “solely as an investment” since Trian acquired rights not available to an ordinary shareholder i.e. (a) Trian closed the transaction and obtained the right to nominate two individuals to the board on the same date; and (b) it nominated individuals to the board of the Target within a short period of 2 months.

B. Open-market Purchases

Another noteworthy decision which sheds light on how the CCI perceives open-market purchases is the decision in *SABIC International Holdings B.V.*¹²

This case involved the acquisition of shareholding in Clariant A.G (Clariant) by

⁹ Item 1 of the Competition Commission of India (Procedure in regard to the transaction of Business) Regulations, 2011 (Combination Regulations) exempts acquisitions of less than 25 percent of the shares or voting rights of a business made solely as an investment, or in the ordinary course of business, provided that the acquisition does not lead to a change in control.

¹⁰ *Supra* note 5.

¹¹ *Supra* note 5.

¹² *Supra* note 5.

SABIC International Holdings B.V. (“SABIC”) in the following manner: (a) acquisition of 24.99 percent stake in Clariant in January 2018 (Transaction 1); (b) acquisition of an additional 6.51 percent stake (Additional Stake) in Clariant through a series of open-market purchases involving an escrow mechanism in May 2020 (Transaction 2) (collectively, “Transaction”). Additionally, post Transaction 1, SABIC also entered into a Governance Agreement with Clariant in September 2018 (Agreement), wherein it could nominate up to 4 directors on the board. Interestingly, while SABIC failed to notify Transaction 1, it sought approval from the CCI for Transaction 2.¹³ However, the CCI viewed both legs of the Transaction as problematic, since they independently failed to qualify for the Item I Exemption.

With regard to Transaction 1, SABIC claimed that it could claim the benefits of the Item I Exemption. However, the CCI disagreed by placing reliance on the underlying transaction documentation, coupled with a press release issued by SABIC, which lay out its intention to participate in the affairs or management of Clariant, thereby failing to meet the criteria required for claiming an Item I Exemption.

Regarding Transaction 2 (which involved the use of an escrow mechanism) relying on its previous decision, the CCI remarked that, considering the *ex ante* nature of the merger control regime, an acquisition of shares via an escrow mechanism was unlawful without obtaining its prior approval. Surprisingly, despite the escrow mechanism and SABIC’s voluntary recusal from exercising its rights in the Additional Stake, the CCI continued to hold that such voluntary recusal did not obviate the requirement to obtain prior approval for Transaction 2.

III. Takeaways

The CCI has always closely scrutinized the “notifiability” of a transaction and the aforementioned decisions are testament to its rigorous analysis. Predictably, the decisions of the CCI are also similarly worded, given the

similarities in the issues under deliberation. The CCI has repeatedly clarified its stand on some key aspects, such as their criteria for classifying a transaction as “solely as an investment” / “ordinary course of business,” proximity of steps leading up to the culmination of a transaction, among others. Given the reliance placed on the Item I Exemption by investors and private equity / venture capital funds, the silver lining is that the decisions clearly define the standards that will guide understanding of expressions such as “*transactions undertaken in the ordinary course of business*” and “*transactions undertaken solely as an investment.*”

Further, the CCI’s stance on the escrow mechanism has also been reinforced through its decision in the *SABIC* case. While the decision is in line with its previous approach towards an escrow mechanism, one may have expected the CCI to adopt a more pragmatic stance in light of the fact that the CCI too has recognized that escrow mechanisms are innocuous measures which can be used to facilitate transactions without transgressing established competition law principles. In fact, the Competition Amendment Bill, 2022 (“Amendment Bill”)¹⁴ has introduced a new provision which seeks to exempt open-market purchases from the purview of standstill obligations, subject to certain conditions under the Competition Act. This lends credence to the argument that so long as parties honor separate obligations and do not prematurely integrate or acquire influence over each other’s operations, an escrow mechanism should ideally not raise any competition law concerns. For context, the Amendment Bill proposes to create a carve-out for open-market purchases so long as: (a) the CCI being notified of the transaction within such time and manner as prescribed, and (b) the acquirer does not exercise any ownership, beneficial rights or interest in the target entity until the transaction is approved by the CCI.

It is expected that once the amendment is enforced, transacting parties will be granted flexibility to structure their transactions without fear of incurring gun-jumping fines, in line with international best practices.

¹³ The CCI approved Transaction 2 on September 2, 2020 – Combination Registration No: [C-2020/05/746](#).

¹⁴ Section 6A of the Amendment Bill. The Amendment Bill is currently pending before the Parliament.

