



COMPETITION COMMISSION OF INDIA

30th August 2022

Proceedings against Global Infrastructure Partners India Private Limited under Section 43A of the Competition Act, 2002

CORAM:

Mr. Ashok Kumar Gupta
Chairperson

Ms. Sangeeta Verma
Member

Mr. Bhagwant Singh Bishnoi
Member

ORDER UNDER SECTIONS 43A OF THE COMPETITION ACT, 2002

A. INTRODUCTION

This Order shall dispose of the proceedings under Section 43A of the Competition Act, 2002 (**Act**) against Global Infrastructure Partners India Private Limited (**GIP /Acquirer**)¹, in relation to its acquisition of the infrastructure asset management business of IDFC Alternatives Limited (**IDFC Alternatives**).

2. From the information available on records, the Competition Commission of India (**Commission**), in its meeting held on 29th December 2021, observed that IDFC Alternatives entered into a business transfer agreement with GIP *inter alia* to transfer investment management rights for certain funds managed by it, on a going concern basis for a lump sum consideration (**Acquisition**). It was apparent that the Acquisition become effective from 1st July 2018². However, no notice was given to the Commission under Section 6(2) of the Act in respect of the Acquisition. Therefore, GIP was directed under Section 36(4) of the Act, to

¹ Formerly known as Global Infrastructure Partners India LLP

² Source: Annual Report of IDFC Limited for FY 2018-19



furnish certain information to assess whether any further proceeding is required under Section 20(1) and/or Section 43A of the Act, as the case may be. In response, GIP furnished its written submissions dated 16th February 2022 and 22nd April 2022 (**Responses**). GIP also voluntarily made another submission dated 7th June 2022.

3. One of the contentions of GIP is that the Acquisition was concluded almost 4 years ago and the *proviso* to Section 20(1) of Act provides that Commission shall not initiate any inquiry into a combination after the expiry of one year from the date on which such combination has taken effect. In this regard, the Commission notes that the instant proceedings are not limited to the inquiry under Section 20(1) of the Act but also under Section 43A of the Act to ascertain whether the parties have failed to give notice to the Commission in terms of Section 6(2) of the Act, in respect of the Acquisition. The Commission further notes that the period of limitation contained in Section 20(1) of the Act is not applicable to proceedings under Section 43A of the Act. To such extent, the contentions of GIP that the instant proceedings are time barred in view of Section 20(1) is misplaced and *sans* merit.

B. TRANSACTION

4. The Acquisition envisaged GIP acquiring the following from IDFC Alternatives (**Business Undertaking**):

- 4.1 the infrastructure fund management business involving rights to act as investment manager to the India Infrastructure Fund (**IIF I**)³ and the India Infrastructure Fund II (**IIF II**)⁴;
- 4.2 certain identified assets and liabilities as specified in the business transfer agreement entered *inter alia* between GIP and IDFC Alternatives on 27th April 2018); and
- 4.3 the team associated with managing the aforementioned funds.

5. Pursuant to the Acquisition, GIP has become the investment manager of IIF I and IIF II. Suitable amendments have also been made to the investment management agreements, trust

³ Venture capital fund registered with the Securities and Exchange Board of India (**SEBI**) and set up as a trust under the Indian Trusts Act, 1882, the trustee of which was IDFC Trustee Company Limited (**IDFC Trustee**) at the time of consummation of the transaction.

⁴ An alternative investment fund registered with SEBI and set up as a trust under the Indian Trust Act, 1882, the trustee of which was IDFC Trustee at the time of consummation of the transaction.



deeds and contribution agreements in relation to IIF I and IIF II. These provide that post closing of the Acquisition: (i) GIP shall effectively step into the role of the outgoing investment manager of IIF I and IIF II viz. IDFC Alternatives, and (ii) GIM India Holdings L.P., an affiliate of GIP, shall effectively step into the role of the outgoing sponsor of IIF I and IIF II viz. IDFC Limited. GIP is *inter alia* entitled to all rights and title of the Business Undertaking. GIP, in its capacity as the investment manager of IIF I and IIF II, could exercise the rights available to the fund(s) in the investee companies. These rights are exercised through nominees of IIF I and IIF II on the boards of directors of the investee companies, and by way of exercise of voting rights at the meetings of shareholders of the investee companies.

C. STATUTORY PROVISION

6. Section 6(2) of the Act *inter alia* provides that any person or enterprise who or which proposes to enter into a combination shall give notice to the Commission. Further, Section 43A of the Act provides that if any person or enterprise who fails to give notice to the Commission under Section 6(2) of the Act, 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. Section 54 of the Act empowers the Central Government to provide for exemption from the application of the provisions the Act. Further, Regulation 4 of the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (**Combination Regulations**) provides that the categories of combination specified in Schedule I therein need not normally be filed as they are ordinarily not likely to cause an appreciable adverse effect on competition in India. These make it abundantly clear that unless the requirement of the notice has been dispensed with by way of exemption provided under Section 54 of the Act or the Combinations Regulations, a person or enterprise proposing to enter into a combination is under an obligation to give notice to the Commission under Section 6(2) of the Act, failing which such person or enterprise shall be liable for a penalty in terms of Section 43A of the Act.

D. ISSUES FOR DETERMINATION

7. In the facts and circumstances of the case, it would be relevant to examine following:
 - 7.1. Whether the Acquisition is a combination in terms of Section 5 of the Act; and
 - 7.2. Whether notification of the Acquisition is dispensed with pursuant to any exemption provided under Section 54 of the Act or the relaxations provided under Regulation 4 read with Schedule I to the Combination Regulations.



E. SUBMISSIONS DATED 7TH JUNE 2022 OF GIP

8. GIP has submitted that at that time of the Acquisition, it had sought advice from its legal counsel. Based on the financials of IDFC Alternatives, IIF I and IIF II, without considering financials of the controlled portfolio entities, GIP was advised that the Acquisition could avail the benefit of *De Minimis* Exemption⁵ and therefore, the Acquisition is not notifiable to the Commission. Accordingly, GIP proceeded to consummate the transaction with a *bona fide* belief that the Acquisition does not call for a notification under Section 6(2) of the Act. At no point, there was any intention on the part of GIP to avoid compliance or assessment of the transaction by the Commission. At that time, GIP did not have the benefit of findings of the Commission in its recent order in *Investcorp Case*⁶.

9. GIP has now submitted that the Acquisition is a combination in terms of Section 5 of the Act and is not eligible for the benefit of *De Minimis* exemption. It has been further submitted that the Acquisition is also not eligible for relaxation provided under Regulation 4 read with Schedule I of Combination Regulations. Accordingly, the Acquisition ought to have been notified under Section 6(2) of the Act and the parties should have complied with the standstill obligation under Section 6(2A) of the Act. However, GIP consummated the Acquisition without giving notice to the Commission under Section 6(2) of the Act. Therefore, GIP has become liable for a penalty in terms of Section 43A of the Act. GIP has requested the Commission to immediately conclude the instant proceeding. It has further waived the right to notice and an opportunity to be provided to it in terms of Regulation 48(1) of the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (**General Regulations**). GIP has also submitted that GIP submit itself to any penalty which may be levied by the Commission in terms of the provision of Section 43A of the Act. GIP has further undertaken that any order imposing penalty, as aforesaid, shall be duly and immediately complied with, without any demur or protest. GIP has requested that its conduct and cooperation in the instant proceeding be taken into consideration for benevolence from the Commission in deciding the amount of penalty.

F. DETERMINATION BY THE COMMISSION

10. It is observed that the provision of Regulation 48 of the General Regulations provides for the procedure to levy penalty under any of the provisions contained in Chapter VI of the Act. Regulation 48(1) of the General Regulations provides that no order or direction imposing

⁵ Granted through notification no. S.O. 988(E) dated 27th March 2017 issued by the Ministry of Corporate Affairs, Government of India in exercise of power granted to the Central Government under Section 54 of the Act

⁶ Order dated 17th December 2021 of the Commission issued under Section 43A of the Act against Investcorp India Asset Managers Private Limited



a penalty under Chapter VI of the Act shall be made unless the person or the enterprise or a party to the proceeding, during an ordinary meeting of the Commission, has been given a show cause notice and reasonable opportunity to represent his case before the Commission. This imbibes the fundamental principle of natural justice that no one be condemned without an opportunity of being heard. However, in the instant matter, GIP has made detailed submission admitting its contravention of the provisions of Section 6(2) of the Act. In view of such admission, it has waived its right to notice and opportunity under Regulation 48 of the General Regulations, to represent any case that its conduct does not amount to a contravention. It has further submitted that it would comply with the order, if any, of the Commission that imposes penalty under Section 43A of the Act. Thus, in the facts and circumstances of the case, the Commission does not find it necessary to issue a notice under Regulation 48 of the General Regulations.

11. Coming to the merits of the issues involved, it is observed that pooled investment schemes generally envisage demutualisation of investment management and ownership, wherein the subscribers give authority to the investment managers to conduct the operations of the fund. The investment manager of the fund, being the authority to exercise and protect such interest, would invariably enjoy control over the portfolio entities where the shareholding and/or contractual rights of the fund is such as to enable material influence or higher degree of control over such portfolio entities. When the management of such a fund is acquired, the acquirer would gain control over the portfolio entities of the fund. Acquisition of control is one of the forms of combination under Section 5 read with Section 2(a) of the Act. Accordingly, in addition to the target business *i.e.* management of the fund, the value of assets and turnover of the controlled portfolio entities would also be relevant for the purpose of computing thresholds under Section 5 of the Act as well as the *De Minimis* exemption. It is immaterial whether beneficial interest or ownership over the portfolio entities is being acquired or not. GIP has also acknowledged these in its submissions dated 7th June 2022.

12. The Commission notes that the assets and turnover of even some of the portfolio companies of IIF I and IIF II, where they have more than 50% shareholding, were more than the financial threshold prescribed under Section 5 of the Act. Financials of these portfolio companies were also in excess of the threshold prescribed for *De Minimis* Exemption. Thus, the Acquisition is a combination in terms of Section 5 of the Act and is not eligible for the benefit of *De Minimis* Exemption. The material available on record also suggest that the Acquisition is not covered under any of the categories of combination contained in Schedule I to the Combination Regulations. However, GIP consummated the Acquisition without giving notice to the Commission under Section 6(2) of the Act, thereby making itself liable for levy of penalty in terms of Section 43A of the Act.



13. Section 43A of the Act provides that 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 upto one percent of the total turnover or the assets, whichever is higher, of such a combination. Though the penalty under Section 43A of the Act can be to the said extent mentioned therein, the Commission has sufficient discretion to consider the conduct of the parties and circumstances of the case to arrive at an appropriate amount of penalty.

14. In the instant matter, GIP has extended its co-operation by supplying requisite material/documents, which formed the basis of the above findings of contravention. As elucidated above, GIP has admitted the contravention, even before issuance of notice under Regulation 48 of the General Regulations, and has thus, saved regulatory resources. Keeping these in mind as well as the submissions of GIP, the Commission considers it appropriate to impose a penalty of INR 30,00,000 (Indian Rupees Thirty Lakh) on GIP under Section 43A of the Act. It is ordered accordingly. GIP shall pay the penalty within 60 days from the date of communication of this order.

15. The Secretary is directed to communicate this order to GIP, accordingly.