



COMPETITION COMMISSION OF INDIA

11th August 2023

In re: Proceedings against Cummins Inc. under Section 43A of the Competition Act, 2002

CORAM:

Ms. Ravneet Kaur
Chairperson

Ms. Sangeeta Verma
Member

Mr. Bhagwant Singh Bishnoi
Member

Appearances during the hearing:

For Cummins Inc. : Mr. Bharat Budholia, Mr. Sanjeev Kumar and Ms. Ruchi Khanna, Advocates along with Mr. Kevin Caudill and Ms. Sanjit K. Batra, representatives of Cummins Inc.

Order under Section 43A of the Competition Act, 2002

1. This Order shall dispose of the proceedings under Section 43A of the Competition Act, 2002 (**Act**) against Cummins Inc. (**Cummins**) in relation to the combination, comprising acquisition of sole control of Meritor Inc. (**Meritor**) by Cummins.

Notice, Transaction and the Parties

2. On 2nd November 2022, the Competition Commission of India (**Commission**) received a notice (**Notice**) given by Cummins. The Notice was given in relation to the combination, comprising acquisition of sole control of Meritor by Cummins by way of reverse triangular merger, where Rose NewCo Inc., a company newly incorporated by Cummins, merged with and into Meritor; and Meritor survived as a directly wholly owned subsidiary of Cummins (**Cummins-Meritor Combination**). The Commission, *vide* its order dated 14th March 2023, approved the combination under Section 31(1) of the Act.
3. It has been submitted in the Notice that the combination was consummated on 3rd August 2022, *i.e.*, before giving Notice to the Commission.
4. Cummins is a global supplier that designs, manufactures, distributes and services diesel, natural gas, electric and hybrid powertrains and powertrain-related components including

filtration, after-treatment, turbochargers, fuel systems, controls systems, air-handling systems, automated transmissions, electric power generation systems, batteries, electrified power systems, hydrogen generation and fuel cell products.

5. Meritor is a global supplier of axles, brakes, and other modules and components to original equipment manufacturers and the aftermarket for the commercial vehicle, transportation and industrial sectors. Its principal products are axles, drivelines, brakes, and suspension systems.

Issue of Show Cause Notice

6. The Commission, *vide* its order dated 18th May 2023 (SCN), based on the assets and turnover of Cummins and Meritor, observed that the Cummins-Meritor Combination is a combination in terms of Section 5 of the Act. The Commission further observed that both the assets and turnover of Meritor in India are higher than the threshold prescribed for *De Minimis* Exemption, *i.e.*, the exemption granted from the provisions of Section 5 of the said Act under notification no. S.O. 988(E) dated 27th March 2017 read with notification no. S.O. 1192(E) dated 16th March 2022 issued by the Ministry of Corporate Affairs, Government of India, under Section 54 of the Act. Thus, the Cummins-Meritor Combination is not eligible for the benefit of *De Minimis* Exemption.
7. In the Notice, it was also submitted by Cummins that the Cummins-Meritor Combination meets the thresholds prescribed under Section 5 of the Act. Thus, it is a combination in terms of Section 5 of the Act. Further, the Cummins-Meritor Combination does not benefit from the *De Minimis* exemption.
8. In view of the above, it appeared that a notice in terms of Section 6(2) of the Act was required to be given by Cummins before consummation of the Cummins-Meritor Combination and the parties to the transaction were required to observe standstill obligation for 210 days from the date of giving notice to the Commission or date of approval by the Commission, whichever is earlier. However, the Cummins-Meritor Combination was consummated without giving notice, in terms of the provisions of Section 6(2) of the Act, to the Commission. Further, the parties to the Cummins-Meritor Combination did not observe the standstill obligation in terms of Section 6(2A) of the Act.
9. Accordingly, *vide* the SCN, Cummins was directed to show cause in writing, within specified time, as to why it should not be held in contravention of the provisions of Section 43A of the Act for consummating the Cummins-Meritor Combination without giving notice to the Commission in terms of the provisions of Section 6(2) of the Act. Further, Cummins was allowed to make its submissions on the quantum of penalty which may be levied by the Commission in the event it is to be held in contravention of the provisions of Section 43A of the Act.

10. Cummins, *vide* its communication dated 8th June 2023, furnished its response to the SCN (**Response**) and requested for an oral hearing before the Commission in the matter. On 25th July 2023, the Commission heard the submissions and arguments of Cummins, at length.

Submissions of Cummins

11. Cummins has primarily submitted that at the time of assessment of notification requirement, Cummins and Meritor were separate and independent companies. Therefore, neither Cummins nor any of its employees had access to Meritor's confidential financial information. Further, as Meritor was a USA listed/public company at that time, the applicable securities laws and regulations imposed additional restrictions on Meritor to share such in-depth information directly with Cummins. Exchange of information between Cummins and Meritor took place only between the outside counsel of parties, on a counsel-to-counsel basis. Based on the information shared, it was determined that benefit of *De Minimis* Exemption is available to the transaction, in terms of turnover threshold for *De Minimis* Exemption. It has been submitted that after having access to the detailed financial information, in the context of some unrelated regulatory compliance matters involving Meritor's India business, Cummins and its counsel became concerned that the India turnover values provided by Meritor prior to closing might have been incorrect. The revised figures showed that Meritor's turnover in India exceeded the *De Minimis* Exemption turnover threshold. The inadvertent error which led to the delayed filing was a *bona fide* mistake that occurred at Meritor's behest. During the hearing, it was clarified that certain figure related to India was inadvertently assigned to some other country. It has been submitted that Cummins did not have any role to play towards the inadvertent error committed during the assessment of notification requirement. As soon as Cummins became aware of the error, it voluntarily, promptly and proactively approached the Commission to notify the transaction.

Findings of the Commission

12. The Commission has considered the written and oral submissions of Cummins. Cummins has primarily argued that failure to notify the transaction to the Commission was a result of a *bona fide* error by Meritor in computing its turnover in India, and upon knowing about the error, Cummins notified the transaction to the Commission.
13. Before delving into issues for determination, it is relevant to refer to relevant statutory provisions. Section 6(2) of the Act provides that any person or enterprise who or which proposes to enter into a combination shall give notice to the Commission. Section 6(2A) of the Act provides that 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) of the Act or the Commission has passed orders under Section 31, whichever is earlier. However, Section 54 of the Act empowers the Central Government to grant exemption from the application of the Act, or any provision thereof. Further, Regulation 4 of the Combination Regulations provides that, since the categories of combinations mentioned

in Schedule I are ordinarily not likely to cause an appreciable adverse effect on competition in India, notice under Section 6(2) of the Act need not normally be filed. Section 43A of the Act provides that if any person or enterprise 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 1% of the total turnover or the assets, whichever is higher, of such a combination.

14. From the above, it is apparent that a person or enterprise proposing to enter into a combination needs to give notice to the Commission unless the requirement has been dispensed with. Such notice is required to be given before consummation of the combination.
15. It is an admitted fact that the Cummins-Meritor Combination is a combination in terms of Section 5 of the Act, and does not benefit from the *De Minimis* exemption.
16. With regard to submissions of Cummins, in relation to *bona fide* error in assessing the applicability of the *De Minimis* Exemption, it may be noted that Section 43A of the Act makes it abundantly clear that its provisions get attracted if there is failure to give notice to the Commission by the parties under Section 6(2) of the Act, irrespective of whether it was inadvertent or intentional. The argument about error is not relevant for determining whether Section 43A of the Act gets attracted to a case or not. Cummins does not get absolved from the duty cast upon it by the Act, merely on the ground of an error in assessing the applicability of the *De Minimis* Exemption.
17. The Commission observes that, the Cummins-Meritor Combination was consummated without giving notice to the Commission in terms of Section 6(2) of the Act and the parties to the Cummins-Meritor Combination did not observe the standstill obligation in terms of Section 6(2A) of the Act. Therefore, the Commission is of the view that Cummins is liable for penalty under Section 43A of the Act.
18. It has been submitted that Cummins' Code of Business Conduct, *inter alia*, provides that the foremost principle of Cummins is to follow the law everywhere. It has also been submitted that there are several mitigating circumstances/factors which the Commission has considered in some of its previous cases and, taken a lenient view. Cummins has *inter alia* submitted that it extended co-operation in the proceeding and voluntarily approached the Commission as soon as it determined that the transaction required a notification.
19. Cummins has also referred to the recent amendment to Section 43A of the Act in 2023, wherein the words "*the Commission shall impose ... a penalty*" has been replaced with the words "*the Commission may impose ... a penalty*". In this regard, the Commission observed that the said amendment to Section 43A of the Act is yet to be notified by the



Government of India for its enforcement. Nevertheless, the Commission would continue to have the power to impose penalty for non-compliance of Section 6(2) of the Act.

20. It may be noted that Section 43A of the Act prescribes the extent of penalty that can be levied for failure to give notice to the Commission under Section 6(2) of the Act. Section 43A of the Act empowers the Commission to impose a penalty on such person or enterprise which may extend to 1% of the total turnover or the assets, whichever is higher, of such a combination. While arriving at an appropriate amount of penalty in a case, the Commission may consider the factors such as the conduct of the parties during the proceedings, circumstances of the case, *etc.*
21. Considering the case in *toto*, and the mitigating factors submitted by Cummins, the Commission considers it appropriate to impose a penalty of INR 10,00,000 (INR Ten lakh) on Cummins. Cummins shall pay the penalty within 60 days from the date of receipt of this order.
22. It is made clear that nothing contained in this order shall be deemed to be confidential, as the same has been used for the purposes of the Act in terms of the provisions contained in Section 57 of the Act.
23. The Secretary is directed to communicate this order to Cummins.