



INTERNATIONAL LAW  
JOURNAL

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**WHITE BLACK  
LEGAL LAW  
JOURNAL  
ISSN: 2581-  
8503**

*Peer - Reviewed & Refereed Journal*

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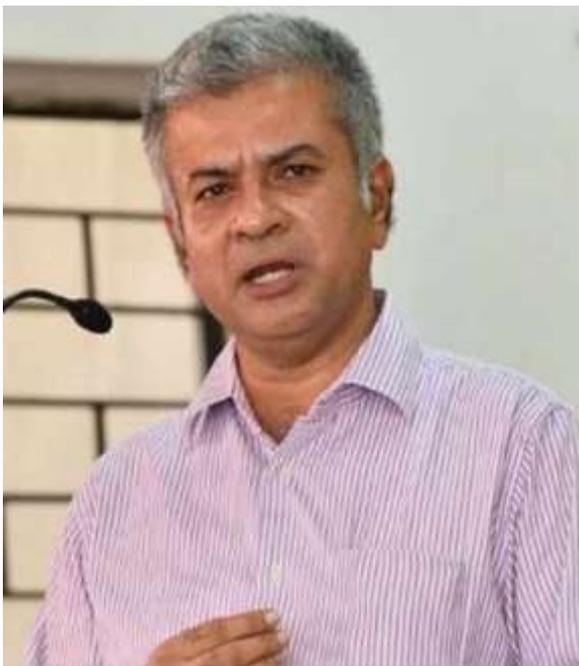
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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

# **GUN JUMPING AND CLEAN TEAM AGREEMENTS – THE ADANI GREEN-SOFTBANK CASE**

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## **I. Introduction**

No effective merger control regime is complete without a system of regulation and penalization of gun jumping. There are numerous ways that a firm may engage in gun jumping, and one such way is through the exchange of information which could potentially be competitively sensitive. However, due to the nature of many transactions, it is almost inevitable that some competitively sensitive information must be exchanged between the parties to effectively plan and undergo such transactions. Therefore, to balance the objectives of businesses as well as the regulator, the parties must find ways to facilitate this exchange of information while simultaneously ensuring that the same does not amount to gun jumping. To resolve this issue, many parties enter into clean team agreements, but due to the lack of jurisprudence on how clean team agreements are to be dealt with by the CCI, parties often have a certain lack of clarity. However, the order passed by the CCI pertaining to the Adani Green – Softbank merger (hereinafter “the Order”) has shed immense light on this.<sup>1</sup> This article will look to explore the impact and potential utility of using clean team agreements in transactions in light of the Order.

## **II. Legal Background**

While many will likely know the key provisions pertaining to gun jumping (ie. S.6(2),<sup>2</sup> 6(2A),<sup>3</sup> and 43A<sup>4</sup>) one may not be as familiar with clean team agreements. A clean-team agreement is a form of agreement which is meant to facilitate the exchange of potentially competitively sensitive information between the parties to a transaction without raising any competition concerns. This is done by creating a “clean team,” which is a group of individuals who are to receive the sensitive information from one of the parties and create a summary report to reflect

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<sup>1</sup> Proceedings against Adani Green Energy Ltd under Section 43A of the Competition Act, 2002, Reference No C-2021/05/837.

<sup>2</sup> Competition Act, 2002, § 6(2), No. 12, Acts of Parliament, 2003.

<sup>3</sup> Competition Act, 2002, § 6(2A), No. 12, Acts of Parliament, 2003.

<sup>4</sup> Competition Act, 2002, § 43A), No. 12, Acts of Parliament, 2003.

the given information. This summary report must summarize the sensitive information in a manner which will provide the receiving party with the information they require while also ensuring that the actual sensitive information is not revealed. Therefore, an effective clean-team agreement must impose numerous safeguards and/or obligations to ensure that the clean team does not reveal any sensitive information. While the Act has remained silent on their potential usage and/or the repercussions of the same, the CCI has recognized clean-team agreements and their potential utility in their Compliance Manual for Enterprises<sup>5</sup> and their FAQs from September, 2022.<sup>6</sup> In the aforementioned, the CCI has encouraged parties to implement clean-team agreements when conducting due diligence and/or integration planning so that they can exchange any required sensitive information without raising competition concerns. As it pertains to the composition of clean teams, the CCI has specified that clean teams “should not include personnel who are involved in pricing, marketing, sales, etc.”<sup>7</sup> nor should they include any other individuals who may be influenced, consciously or unconsciously, by the competitively sensitive information that they receive while in the clean team, as this information must not be used to affect the day-to-day operations of the business.<sup>8</sup>

### III. The Order

#### A. *Facts of the Case*

Adani Green Energy Limited (hereinafter “the Acquirer”), wanted to acquire the entire shareholding of S.B. Energy Holdings Limited (hereinafter “the Target”). In pursuance of this, the Acquirer executed Share Purchase Agreements (hereinafter “SPA”) with Softbank Group Capital Limited and Bharti Global Limited on May 18<sup>th</sup>, 2021. On May 20<sup>th</sup>, 2021, the Acquirer gave a notice to the CCI of the proposed acquisition. Upon receiving the notice, the CCI had some concerns, so they directed the Acquirer to provide them with details regarding the steps that were taken, or would be taken, in pursuance of the transaction. They also requested documents relating to certain deliberations made, information exchanged, and decisions taken. The Acquirer duly provided them with the information they requested, and upon reviewing it, the CCI approved the combination on June 30<sup>th</sup>, 2021. However, during a meeting on August

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<sup>5</sup> Competition Commission of India, *Compliance Manual for Enterprises*, CCI (May 2, 2017), [https://www.cci.gov.in/images/publications\\_compliance\\_manual/en/compliance-manual1652179683.pdf](https://www.cci.gov.in/images/publications_compliance_manual/en/compliance-manual1652179683.pdf).

<sup>6</sup> Competition Commission of India, *Frequently Asked Questions*, CCI (September, 2022), <https://www.cci.gov.in/images/whatsnew/en/faq-english-compressed-31020221664785663.pdf>.

<sup>7</sup> Competition Commission of India, *Compliance Manual for Enterprises*, CCI (May 2, 2017), [https://www.cci.gov.in/images/publications\\_compliance\\_manual/en/compliance-manual1652179683.pdf](https://www.cci.gov.in/images/publications_compliance_manual/en/compliance-manual1652179683.pdf).

<sup>8</sup> Competition Commission of India, *Compliance Manual for Enterprises*, CCI (May 2, 2017), [https://www.cci.gov.in/images/publications\\_compliance\\_manual/en/compliance-manual1652179683.pdf](https://www.cci.gov.in/images/publications_compliance_manual/en/compliance-manual1652179683.pdf).

9<sup>th</sup>, 2021, the CCI realized there was a possibility that the Acquirer had violated its standstill obligations, as it felt that one of the clauses in the Softbank SPA may have had the effect of consummating the combination, at least in part, before it had been approved by the Commission. Therefore, the Commission issued a show cause notice on August 14<sup>th</sup>, 2021.

The CCI expressed multiple concerns about the clause. To begin with, the CCI pointed out that the clause, and the action contained therein, came into effect on May 18<sup>th</sup>, 2021 (the date of execution of the SPA in question), and this preceded the CCI granting their approval of the combination. The CCI also found cause for concern in the fact that the clause allowed the parties to discuss ongoing business. The Acquirer could provide inputs on the business of the Target, and the Target could make use of such inputs to act in its best interests, as well as the best interests of its subsidiaries. The CCI also noted that, although the parties had implemented some safeguards into the SPA such as clean team protocols and non-binding inputs, these measures were not sufficient to offset the effects that the clause would, or could, have on competition, given that the terms of the clause and the resulting exchange of info and provision of inputs would be sufficient to constitute tacit collusion. Further, the clean team protocols appeared contradictory and did not actually prevent anti-competitive effects. On the one hand, the clean teams were said to be ring fenced from management, but on the other, the inputs that the Acquirer was providing were being considered in the best interest of the Target. The CCI felt that this element of “taking into account” naturally implied that the information would be made available to the management, as only then can the inputs be acted upon.

#### *B. Ratio and Holding*

In the order in question, the CCI identified four tests and took them into consideration when determining whether the Acquirer was liable for gun jumping or not. These tests were derived largely from the Airtel-Tata order<sup>9</sup> and the Hindustan Colas order<sup>10</sup>:

1. Reduction in competition intensity test
2. Infringement with ordinary course of activities test
3. Likelihood of causing potential competition distortions test
4. Inherence-proportionality test

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<sup>9</sup> Notice given under Section 6(2) of the Competition Act, 2002 by Bharti Airtel Limited, Combination Registration No C-2017/10/531.

<sup>10</sup> Notice given under Section 6(2) of the Competition Act, 2002 (“Act”) by Hindustan Colas Private Limited, Combination Registration No C-2015/08/299.

Generally, the satisfaction of any of these tests may be sufficient to constitute a gun jumping concern, but in this case the CCI mainly implemented the 4<sup>th</sup> test. This was combined with an assessment of the safeguards that were put in place to avoid any adverse effects on competition and seeing how effective they would be. With these tests in mind, while also taking into consideration the precedents such set in cases such as the Airtel-Tata case<sup>11</sup> and Hindustan Colas case,<sup>12</sup> the CCI found the Acquirer liable for gun jumping.

As it pertains to the clause from the Softbank SPA, which was the central cause for concern, the CCI held that the clause could neither be considered inherent nor proportionate to the legitimate objective. The CCI noted that the Acquirer had not made any substantive submissions as to why the discussions, especially those pertaining to ongoing business, were required, nor did they furnish documents to support their submissions pertaining to their discussions, deliberations, and exchanges of information under the clause. In this light, the CCI referred to the Airtel-Tata order,<sup>13</sup> noting that the CCI's only guide to the parties' incentives is the agreement between the parties and any information provided to the regulator. With this in mind, the CCI felt that even if they agreed that the intent of the Acquirer was simply to monitor and preserve the economic value of the Target, because the broad phrasing of the clause which would provide wide powers to the Acquirer, and because no explanation was given by the Acquirer to justify such a clause, there was immense potential for the exchange and exploitation of competitively sensitive information, which would amount to gun jumping.

As it pertains to the clean team agreement, while the CCI did recognize the potential use of clean team arrangements to mitigate competition concerns, they found that the Acquirer had only referenced the fact that a clean team did indeed exist but had not made sufficient submissions, or provided enough clarity, on the composition of the clean team or the terms of clean team agreement itself. With this in mind, the CCI held that the mere existence of a clean team was not sufficient to absolve the liability of the parties, and that the clean team agreement must be shown to have sufficient safeguards to address any competition concerns which may arise. Furthermore, the CCI also pointed out that the Acquirer failed to address the inherent

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<sup>11</sup> Notice given under Section 6(2) of the Competition Act, 2002 by Bharti Airtel Limited, Combination Registration No C-2017/10/531.

<sup>12</sup> Notice given under Section 6(2) of the Competition Act, 2002 ("Act") by Hindustan Colas Private Limited, Combination Registration No C-2015/08/299.

<sup>13</sup> Notice given under Section 6(2) of the Competition Act, 2002 by Bharti Airtel Limited, Combination Registration No C-2017/10/531.

contradiction in the SPA discussed earlier. Based on this, the CCI found the clean-team arrangement in this case could not be considered a sufficient safeguard to mitigate the gun jumping concerns.

With all this in mind, the CCI felt that it would only be appropriate to impose a penalty on the Acquirer. However, they also took note that this case was the first of its kind and felt that this was an opportunity to spread awareness and expand the jurisprudence in this area. Therefore, the CCI decided not to impose a heavy penalty on the Acquirer and only imposed a total of Rs. 5 lakhs on the Acquirer. Instead, they used this order to encourage any entities engaging in such transactions to ensure that the agreements through which they would pursue their transactions are precise and objective to avoid any potential concerns of anti-competitive conduct arising. The CCI also clarified that any exchanges of information, as well as any other conduct arising from such transactions, should be inherent and proportional to the legitimate objective of such transactions, and that entities should ensure that they implement any/all necessary safeguards to mitigate any competition concerns.

#### **IV. Analysis**

In its decisional practice, such as in cases like the Trian – Invesco Case<sup>14</sup> and the SABIC – Clariant Case,<sup>15</sup> the CCI has reiterated that competitive dynamics are not affected or influenced solely by active decisions. Even a broad awareness or understanding of sensitive information may cause competition concerns. Therefore, it is crucial for business entities entering into combinations to ensure that they avoid any exchanges of sensitive information which could potentially create competition concerns, and if an exchange of such information is integral to the completion of the transaction, they find an effective means of mitigating such concerns. If executed properly, clean team agreements can prove to be this means of mitigation.

Although the CCI did not find the clean team agreement executed in the Adani Green – Softbank merger sufficient to mitigate the concerns of the CCI, the Order indicates that they are not against the use. In fact, the CCI actually encourages it. In the Order, the CCI acknowledges that “the Commission agrees that clean team protocols do have the potential to

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<sup>14</sup> Proceedings against Trian Partners AM Holdco, Ltd. and Trian Fund Management, L.P., under Section 43A of the Competition Act, 2002, Reference No C-2021/01/810.

<sup>15</sup> Proceedings against SABIC International Holdings B.V. under Section 43A of the Competition Act, 2002, Reference No C-2020/05/746.

safeguard the exchange of competitively sensitive information,”<sup>16</sup> so long as the terms and rules of engagement are explicitly laid down and strictly followed. The CCI has also clearly shown that they are open to the use of clean team agreements in their Compliance Manual for Enterprises<sup>17</sup> and FAQs.<sup>18</sup> Therefore, it is quite evident that the openness of the CCI to clean team agreements as a way to potentially avoid any gun-jumping concerns was not the problem here. Yet, in the Adani Green - Softbank case, the CCI still ruled against the Acquirer. It seems the main reason for this was because the Acquirer did not provide enough information about the clean-team agreement to the CCI, and the same was reiterated in the Order. With this said, if it is assumed that the clean team agreement had sufficient safeguards and utmost confidentiality was maintained, had the Acquirer provided more information to the CCI about the composition of the clean team and the specific terms of the agreement, one could say that the CCI would likely have ruled in favor of the Acquirer. After all, the Acquirer submitted that they had a clean team agreement, and the CCI clearly seems open to considering clean team arrangements as a mitigating factor for competition concerns. Therefore, so long as the terms, conditions, and safeguards within the clean team agreement are sufficient to mitigate any potential competition concerns and the CCI is provided enough information to prove the same, it seems that the CCI is willing to allow the exchange of information between the parties. Overall, the Order will likely prove immensely useful from both a competition and corporate perspective. As already established, it is clear to see that the CCI is very much in favor of the use of clean teams as a method of mitigating competition concerns. Therefore, if properly implemented, the use of clean team agreements can prove beneficial for all parties involved. Clean team agreements are a great way for companies to be able to exercise effective and efficient integration planning without having to worry about competition concerns.<sup>19</sup> These agreements also benefit lawyers, as they will not have to worry about the possibility of backlash from the CCI which saves them immense time and effort. They will even benefit the CCI, as the number of gun jumping cases will likely reduce. At the same time, however, the mere existence of a clean team agreement between two parties does not mean that they may exchange any information they desire, and the Order makes this very clear. In both the Order as well as its

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<sup>16</sup> Proceedings against Adani Green Energy Ltd under Section 43A of the Competition Act, 2002, Reference No C-2021/05/837.

<sup>17</sup> Competition Commission of India, *Compliance Manual for Enterprises*, CCI (May 2, 2017), [https://www.cci.gov.in/images/publications\\_compliance\\_manual/en/compliance-manual1652179683.pdf](https://www.cci.gov.in/images/publications_compliance_manual/en/compliance-manual1652179683.pdf).

<sup>18</sup> Competition Commission of India, *Frequently Asked Questions*, CCI (September, 2022), <https://www.cci.gov.in/images/whatsnew/en/faq-english-compressed-31020221664785663.pdf>.

<sup>19</sup> Anshuman Sakle and Anisha Chand, *Exchanging Information: Is Your Team Clean Enough?*, PL (Comp. L) May 79 SCC, 1 (2018).

decisional practice, the CCI has made it evident that it will only stand for an exchange of information if the same is found to be inherent and proportional to protecting the interests of the business and achieving their legitimate interests, such as preservation of value, effective planning, etc. Further, any information that is exchanged must remain strictly confidential, and there must be sufficient safeguards to ensure the same. Therefore, the parties still must ensure to exercise caution when providing one another with any sort of information which may be considered sensitive. Therefore, like any other agreement, lawyers must ensure to craft the clean team agreements based on the given circumstances and ensuring that they are extremely carefully and create sufficient safeguards within the agreement to ensure that no competition concerns arise.

## **V. Conclusion**

To conclude, gun jumping is a serious violation which can lead to heavy penalties on the offender, and it would be wise for any and all parties engaging in combinations to exercise caution when planning and executing the transaction. There are many ways to help avoid raising any concerns of gun jumping, and it is clear that executing robust clean team agreements can be immensely helpful in mitigating any competition concerns. Therefore, it would be immensely beneficial for lawyers and corporations to implement this tool more often in their transactions so as to allow them to go about their business without having to worry about any backlash from the CCI.